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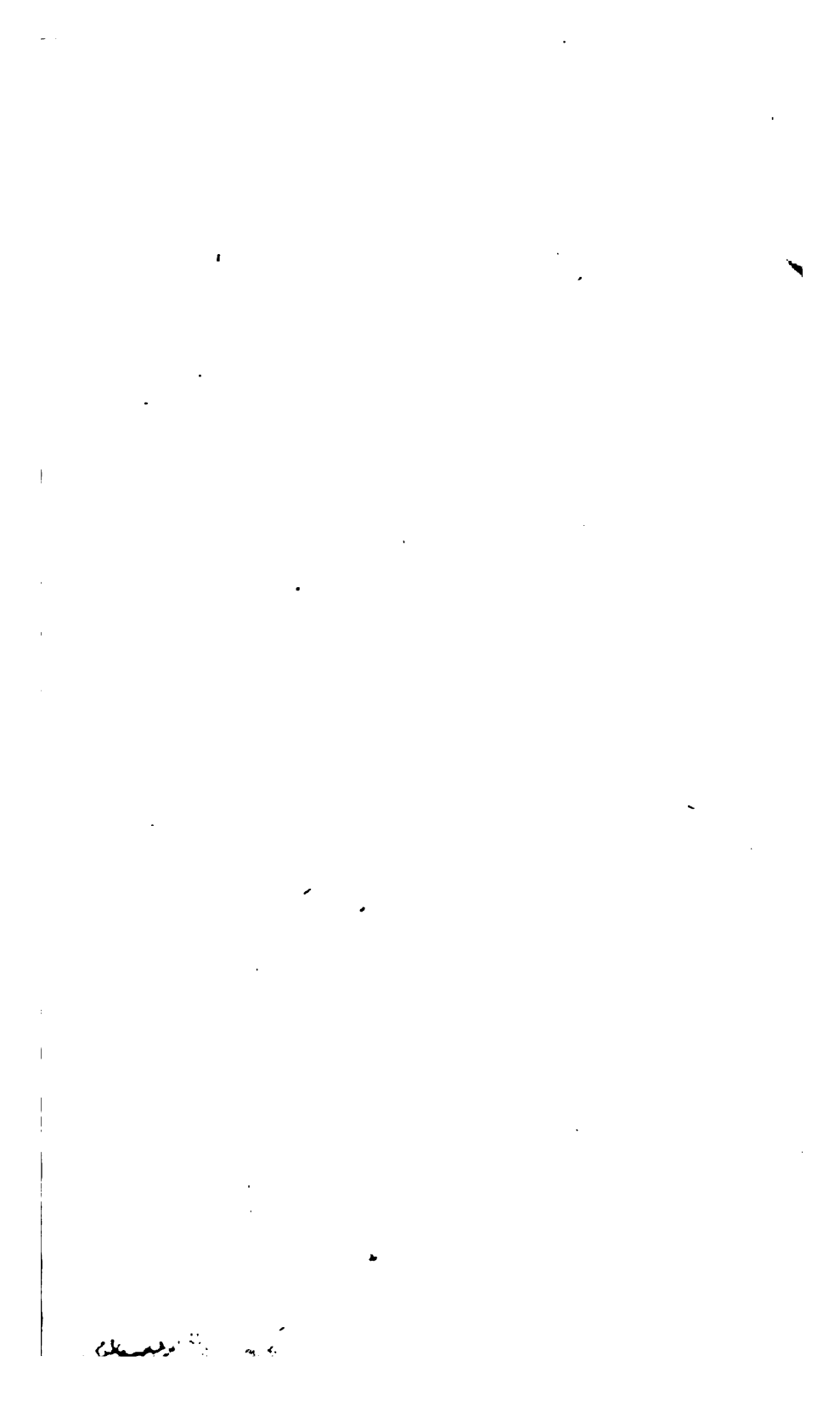
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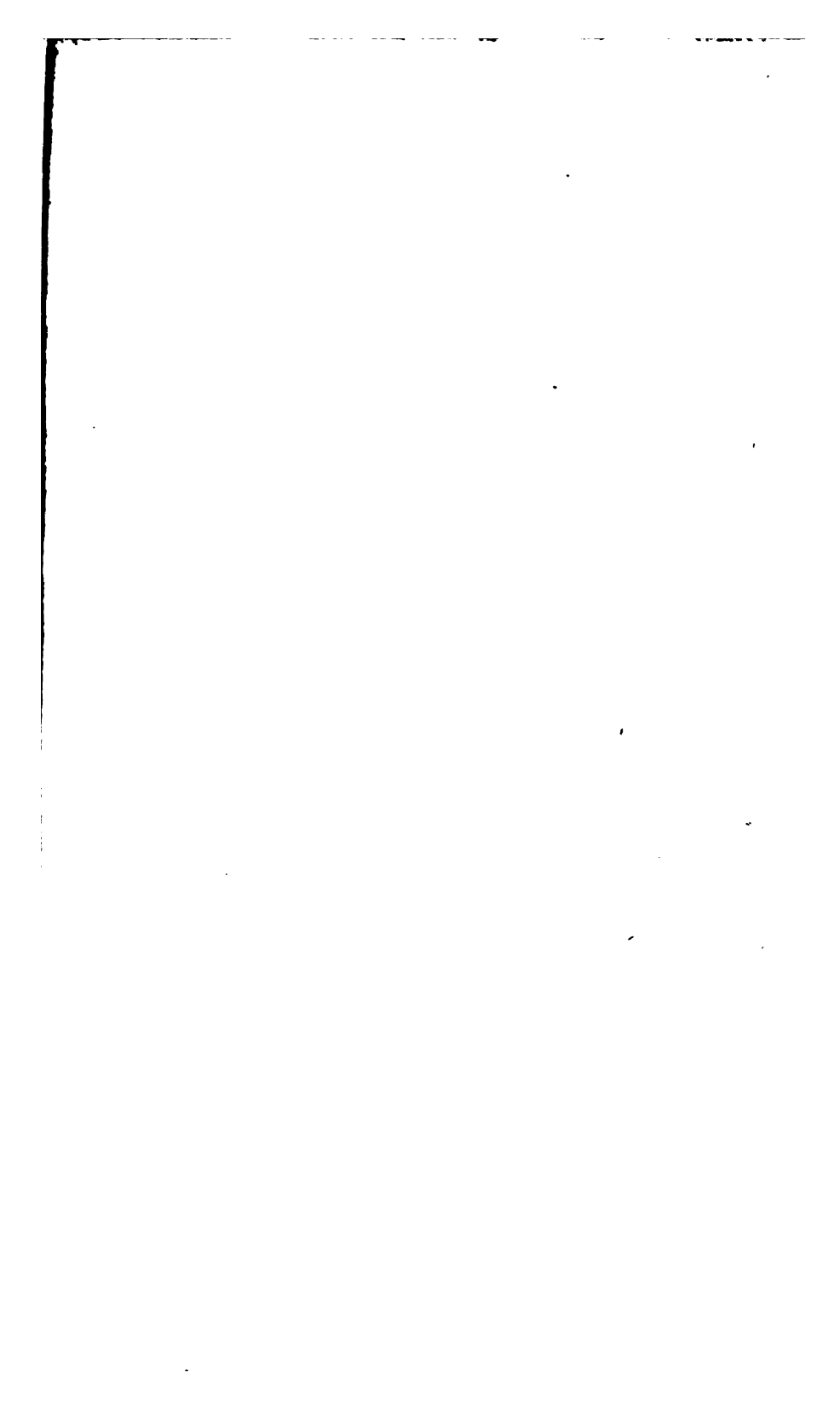
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BY JOHN E. HALL, ESQ.
OF BALTIMORE.

VOL. III.

Seu linguam causis acuis, seu civica jura
Respondere paras.

PHILADELPHIA:

PUBLISHED BY FARRAND AND NICHOLAS.

Also by Philip H. Nicklin & Co. Baltimore; D. W. Farrand & Green, Albany;
D. Mallory & Co. Boston; Lyman, Hall & Co. Portland; Swift & Chipman,
Middlebury, (Vt.); Patterson and Hopkins, Pittsburg; and
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Fry & Kammerer, Printers.

1810.

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District of Pennsylvania, to wit :

***** BE IT REMEMBERED, That on the seventeenth day of
* Seal. * November, in the thirty fifth year of the Independence of the
* ***** United States of America, A. D. 1810, Farrand and Nicholas of
the said district, hath deposited in this office, the title of a book the right
whereof they claim as proprietors, in the words following, to wit:

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Debates on momentous questions, Legal Information respecting the
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Seu linguam causis acuis, seu civica jura
Respondere paras."

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thereof to the arts of designing, engraving, and etching historical and other
prints."

D. CALDWELL,
Clerk of the District of Pennsylvania.

Y. A. M. C. L.

THE
AMERICAN
Law Journal and Miscellaneous Repertory.

No. IX.

IL CONSOLATO DEL MARE.

Translated for this Journal.

The Judicial Order of Proceedings before the Consular Court.

[Continued from vol. II. p. 391.]

CHAPTER XII.

How Causes are to be proceeded in, before the Judge of Appeals.

THE appellant is bound to produce before the judge and the clerk of the consulate court, the record of the proceedings below, requesting him to revoke and correct the sentence of the consuls; and the judge, after the exhibition of the said record, shall appoint a day to hear sentence on the appeal, and the party appellate is to be cited to appear on that day to hear the same: but if, within ten days, the party condemned shall not have appealed verbally or in writing, the sentence has the force of a final judgment.

CHAPTER XIII.

That no new Facts are to be alleged and no new Proofs exhibited on the Appeal.

On such appellate suit, no new fact can be alleged or proved by any of the parties, but the judge is to give his opinion

Vol. III. A

and afterwards, according as he is advised, he gives sentence in the said cause, which is to be given in writing, agreeably to the mandate of our lord the king. And this appellate suit is to be terminated within thirty days, otherwise the first sentence is conclusive, as has been above mentioned.

CHAPTER XIX.

Of the Costs of the Original Suit.

In the original or principal suit, the consuls do not condemn either party to pay costs.

CHAPTER XX.

Of the Costs on the Appeal.

If the judge affirms the sentence of the consuls, he, by his decree, condemns the appellant in the costs incurred by the party appellate, and if he reverses the consular sentence, or corrects the same, he does not condemn the appellant to pay the said costs, as he had just ground to appeal, nor does he condemn the party appellate.

CHAPTER XXI.

Of what may be done before a single Consul.

If either of the consuls shall be absent, being engaged about other business, the parties may nevertheless proceed before the other consul as far as interlocutory or final sentence, neither of which can be pronounced but by both consuls.

CHAPTER XXII.

Of Causes which belong to the Jurisdiction of the Consuls.

The consuls determine all controversies respecting freight, and average of goods shipped on board of vessels, mariner's wages, differences between part owners of ships, and applications to have the same sold at auction in order to make partition thereof, jettison, commissions given to masters of

vessels or mariners, debts contracted by the master for the necessities of his vessel, promises made by the owner to the master, goods found on the high seas or on the shore, fitting out and equipping of vessels, and generally all other contracts which are to be determined by the law marine.

CHAPTER XXIII.

Of the Execution of Sentences.

The consuls cause their sentences to be executed on the moveable property of the party condemned, on his vessel and other goods; it is the same with the sentences of the appellate judge, and it is done in manner and form following; he commands the party condemned, at the instance of him who has obtained the sentence, to pay the money within ten days after the said commandment, or to shew moveable property out of which the sentence may be satisfied, otherwise that the sentence shall be executed out of such like property as shall be shewn by the adverse party.

CHAPTER XXIV.

Of Execution on the Moveable Goods of the condemned Party.

Ships or other property having been shewn, either by the condemned party, or by his adversary on his default, those goods are cried up publicly by the town crier for the space of ten days, and at the expiration thereof, they are sold at public sale to the highest bidder. Out of the proceeds the party who obtained the sentence is to be paid his money and costs, on giving security to refund, in case there shall appear a prior creditor or one better entitled.

CHAPTER XXV.

Of the Creditor who cannot find Security.

If he is a foreigner or inhabitant of the city, and swears that he cannot give the security required, public notice is given by the cryer by sound of trumpet, that as the consuls

are to pay over the proceeds of the sale to the party, who has sworn that he cannot find security to refund, if there be any person who has a claim against the thing sold, or the proceeds thereof, he must prefer his claim before the consuls within thirty days, otherwise the money will be paid to him without security.

CHAPTER XXVI.

Of Execution on the real Property of the Party condemned.

If it should happen that the party condemned had not any personal property, such as vessels and other things, but had some real estate, then the consuls write to the judges of the place where the property lies, that whereas they, the said consuls, have pronounced sentence against such a person for such a sum of money, which has been affirmed by the appellate judge, (if so the case should be) and whereas the party had not any personal property upon which they could execute their said sentence, they therefore request the said judges that in lieu of personal property, they may cause the said sentence to be executed on the real estate of the party condemned, because they, the said consuls, will not intermeddle or interfere with the sale of the said real estate, nor in fact have been accustomed so to do; and thus the said judge of the place causes the sentence of the said consuls to be executed upon the said real estate, according to the legal forms and customs of the place where it is situated.

CHAPTER XXVII.

Of the Master who demands his Freight.

If any master of a ship or vessel shall complain of his merchant for not paying him the freight of the goods which he shall have carried, and if the merchant shall allege, that he is not obliged to pay the said freight, until the said captain shall have delivered to him certain goods, which he affirms are missing according to his correspondent's letter, or otherwise alleges to have been shipped, and until the damage has

been made good to him, which he will affirm he has suffered in his merchandize by the fault of the captain, nevertheless the merchant is bound to pay to the master the freight of the goods which he has delivered to him, as well of those which are in good condition as of those that are damaged or spoiled, he first giving security before the said consuls that he will satisfy the merchant for the goods which he swears to be missing, or make good the damage which the said master shall have occasioned, and this is done, when the merchant's claims are not conceded by the captain. And this demand of freight is not necessary to be made in writing, provided the amount due manifestly appears by written documents, by the confession of the merchant, or in some other way.

CHAPTER XXVIII.

Of Mariner's Wages.

The demand of mariners against the captain for their wages need not be exhibited in writing.

CHAPTER XXIX.

Of Execution against the Captain for Money that he has borrowed.

When the debt of a captain of a vessel is proved by an instrument of writing or by his confession, there is no need of demanding it in writing, but the creditor is only to exhibit the written confession of the debt at the registry of the consuls, and to summon his debtor; and if the term is expired, which was appointed by the said instrument of writing for the payment thereof, the consuls then command the said captain so indebted, that within three, four, or so far as ten days, having regard to the amount of the debt, he shall pay the creditor, or assign to him in pledge, sufficient personal property, clear of liens, by way of security for the payment of the debt, in the said instrument mentioned, otherwise, that execution shall issue against his goods and chattels, which shall be shewn by the creditor, and the proceeds thereof delivered to him

until his debt is fully paid, according to the mode of execution above declared and provided.

CHAPTER XXX.

Of Security to abide by the Sentence of the Court.

If the plaintiff shall demand, either *viva voce* or in writing, that the defendant give security to abide by the judgment of the court on his complaint, and he does not give it, it must then be thus proceeded against him: If he is a stranger, he must immediately give the said security, otherwise he is to be committed to the common prison, and remain there during the suit. And if he swears, that he has not wherewith to pay the sum in which he has been condemned, he is to be discharged out of prison, unless he has been committed for such cause which by the law marine deserves imprisonment in irons, until he has complied with the judgment. But if the defendant resides in the city, and the consuls know that he has property sufficient to pay the plaintiff's demand, in such a case, a term is to be assigned to him, within which he shall give the security required; and if the consuls, being thereto requested, shall not compel the defendant to give such security, and he shall escape, so that he cannot be found, nor any property of his, out of which the plaintiff's demand may be satisfied, then the said consuls, and their property, shall be and remain bound to the payment of the thing adjudged.

CHAPTER XXXI.

Of the Authority of the Consuls.

The consuls of the sea have jurisdiction of all contracts which are to be determined by the law marine, and in all cases specified therein.

CHAPTER XXXII.

Of taking a new built Vessel in Execution.

If a new built ship or vessel should, before she is launched, or before she has made a voyage, be sold at the suit of creditors, the workmen who have assisted in building her, and those who have furnished the timber, pitch, nails, rigging, and other necessities for the same, shall be paid out of the proceeds by privilege, even though there should be creditors by specialty for money lent to the owner to assist him in building the said vessel.

CHAPTER XXXIII.

If the Proceeds are not sufficient to satisfy those Creditors.

If the proceeds of the vessel are not sufficient to satisfy the workmen, and those who have furnished the timber, pitch, nails, oakum and other necessities for the building of the said vessel, such creditors are to be paid *pro rata*, because they all have an equal right to be paid out of the said proceeds. And no such creditor shall be allowed to claim a privilege on account of the priority of his debt.

CHAPTER XXXIV.

In Case a Vessel shall be sold after a Voyage performed, who is to be first paid out of her Proceeds.

If the said ship or vessel shall be sold at the suit of creditors, after having performed a voyage, out of the proceeds thereof the mariners and persons employed on board shall be first paid their wages, without being obliged to give security to refund, and they are to be preferred to every other creditor. After them are to be paid those whose debts are prior in point of time, in the order in which they respectively were contracted, and every one of them shall give security to refund, or shall cause a public notice of thirty days to be given, as is above directed, chapter 25, provided that the creditor

shall swear that he is not able to find the said security. If the said vessel shall have performed a voyage, and there shall remain any thing due to the workmen, or those who have furnished necessaries for the said vessel, yet if they have no writing to prove their demand, they are not to be preferred to those creditors who have specialties. And if the share of the vessel owned by the master who contracted the debt, shall not be sufficient, the shares of the other part owners shall be likewise bound to the payment thereof; but the said other part owners, nor their other property, shall not be bound, if the master had not a procuration or other authority to contract in their names.

CHAPTER XXXV.

How the Master's Wife is to be privileged.

If the master of the said vessel be married, and his wife has obtained a sentence against the goods of her husband for her portion, dowry, or some other just cause, and the husband has no other goods from which the wife may be paid her portion or dowry, and if she has endeavoured to find such goods, then her demand is to be paid by privilege out of the proceeds of the said vessel, if it shall appear by the date of her marriage articles that her claim is older than that of the other creditors, in such case she shall be paid in preference to them out of her husband's share in the said vessel.

CHAPTER XXXVI.

How Suits are to be decided by the Consuls.

The consuls, by virtue of the privilege which they have obtained from our lord the king, are authorised to hear the suits and controversies which shall be brought before them, and to decide upon them in a short time, summarily, without attending to any thing but the real merits of the cause, as has been used to be done, agreeably to the usage and customs of the sea.

CHAPTER XXXVII.

Of the Fees which the Consuls are to receive from the Parties.

In every suit which shall be brought before the consuls, whether verbally or in writing, the two consuls shall receive, by way of compensation, three pence in the pound from each party, that is to say, if one hundred pounds be demanded, and the consuls shall adjudge that there is only twenty pounds or nothing due, yet the consuls shall receive from each party three pence in the pound on the whole hundred pounds demanded, and in proportion for a greater or lesser sum.

CHAPTER XXXVIII.

Of the Compensation of the Appellate Judge.

The judge receives for his compensation in every cause brought before him by appeal from the consuls, three pence in the pound* from each party; that is to say, when an appeal shall actually have been interposed, otherwise not.

CHAPTER XXXIX.

Of Consuls suspected by the Parties.

If one of the consuls shall be suspected by any of the parties, and the reasons of suspicion shall be apparent, in such a case, they are to associate to themselves another person skilled in the customs of the sea; and if both the consuls are suspected, then they are to associate to themselves two such persons, and all together shall hear the cause, and shall not receive any further compensation from either of the parties, than the abovementioned three pence in the pound, which shall be divided between them.

* 1 1-4 per cent.

CHAPTER XL.

Of the Appellate Judge being suspected.

In the same manner, if the appellate judge be challenged as suspicious, in that case they associate to him another maritime person not suspicious to the parties, and they both together hear the appeal, and divide the compensation between them.

CHAPTER XLI.

The Consuls decide agreeably to the Customs of the Sea.

The sentences pronounced by the consuls, or by the judge of appeals, are to be conformable to the marine law, as laid down in various chapters, and when the maritime customs and statutes are not sufficient, they take the advice of good merchants and seamen, and decide agreeably to the opinion of the majority of them.

CHAPTER XLII.

What and in what manner Attachments are to be dissolved.

Every attachment is to be dissolved on security being given to abide by the determination of the suit, except the attachment of property on which freight is due, in which case no security shall be received.

CHAPTER XLIII.

*Ordinance of King James respecting the Oaths of Advocates.**

Know all men, that we, *James*, by the grace of *God*, king of *Arragon*, *Majorca* and *Valencia*, count of *Barcelona* and *Urgel*, lord of *Mompelier*, wishing to promote the advantage of the city and kingdom of *Majorca*, do ordain and establish for us and our heirs, for ever, that advocates shall be sworn in the following form : " I, *A. B.* do swear, that I shall act

with fidelity in my office of advocate, that I shall not do or say any thing from malice in any cause which I shall have to defend, and that if at the beginning, in the middle, or at the end of such suit, it shall appear to me that the cause is not just, I shall immediately tell it to my client, nor shall I make any agreement to receive any part of what may be recovered, nor shall I instruct or direct the parties to say any thing but the truth."

Here ends the judicial order of proceedings before the consular court.

CHAPTER XLIV.

Contains some special regulations respecting the freighting and lading of ships trading to Alexandria in Egypt, which are altogether uninteresting at this day, and we have thought needless to be translated.

CIVIL LAW.

Translated for the American Law Journal.

[Continued from vol. II. p. 471.]

A Translation of the Second Title of the Fourteenth Book of the Digests, entitled, De Lege Rhodiâ de Jactu.

DIGEST, Book XIV. Tit. II.

Of the Rhodian Law concerning Jettison.

LAW I.

Paulus, lib. 2. Sententiarum.

LEGE Rhodiâ. The Rhodian law ordains, that if goods are thrown overboard for the sake of lightening the vessel, as it is done for the good of all, all must come into contribution for the same.

LAW II.

Same, lib. 34. ad edictum.

Si laborante. If while the vessel labours, a jettison is made, if the owners of the goods lost had loaded them on freight, they have an action *ex locato* against the master of the vessel, who has an action *ex conducto* against the owners of the goods saved, that they may make good the damage by contribution. But *Servius* answers, that you must sue the master *ex locato* that he may retain the merchandize of the other passengers, until they shall have contributed their share of the damage. Nay, although the master retains the goods, he has moreover an action *ex locato* against the freighters; but what if they are only passengers who have no goods at all? It is certainly more convenient, if there are any goods, to retain them. But, if there

are none, and if he hired the whole vessel, he must bring his action *ex conducto* as against passengers who have hired places in the vessel; for it is extremely just that those who have saved their goods by the loss of those of others should contribute to the damage.

Si conservatis. § 1. If the goods being preserved the ship is hurt or disabled, no contribution is to take place, because there is a difference between the things that belong to the vessel and those for which a reward is received. For if a smith breaks his hammer or his anvil, it must not be imputed to him who has given him work to do. But if that damage has happened by the act of the passengers, or from fear of danger, they must make good that damage by contribution.

Cum in eadem. § 2. Several merchants had loaded various quantities of goods on board the same ship, in which there were several passengers, both freemen and slaves. A violent tempest having arisen, a jettison became indispensable. It was asked, whether all must contribute to the jettison, and whether those must contribute who had goods on board by which the vessel was not loaded, as pearls, jewels, &c. and in what proportion they must contribute? and whether there must also be a contribution for the heads of freemen, and by what action it could be enforced? It was determined that all must contribute to whom the jettison had been an advantage, because it was a tribute due by those things which had been preserved, and therefore that the owner of the vessel was bound to contribute for his share, and the amount of the jettison must be apportioned according to the value of the goods. No estimation can be made of the body of a freeman. The owners of things lost have an action *ex conducto* against the master of the vessel. It has also been agitated whether an estimation is to be made of the clothes and jewels of every person? And it was unanimously agreed that they should contribute, but not such things as are on board for the sake of being consumed, as provisions. And this is so much the more reasonable, that if they should become scarce in the course of the navigation, what every one has is to be used in common.

Si navis. § 3. If the vessel is ransomed from pirates, *Servius*, *Ofilius* and *Labeo* say that all ought to contribute to the ransom. But whatever is carried off by pirates is to be lost by him to whom it belonged, nor is he to contribute who ransomed his own goods.

Portio autem. § 4. There must, however, be a difference in the valuation of the things that are saved, and of those that are lost; nor is it any matter whether those which have been lost could have been sold for a higher price, because the loss and not the profit is here to be estimated. But as to the things which are to contribute, they must be valued not at the price for which they have been bought, but at that for which they may sell.

Servorum. § 5. Nor can an estimation be made of servants that perish at sea, any more than of sick men who die of sickness on board, or throw themselves into the sea.

Si quis. § 6. If any of the passengers cannot pay, it will be no detriment to the master, for he is not to inquire into the circumstances of every one.

Si res. § 7. If the things that have been thrown overboard appear again, the contribution is discharged; but if it has already been made, then those who have paid have an action *ex locato* against the master, that he may recover it *ex conducto*, and pay what he shall have recovered.

Res autem. § 8. But the thing thrown overboard remains the property of the owner, nor does it belong to the finder, for it is not considered as derelict.

LAW III. .

Papinianus, lib. 19. Responsorum.

Cum arbor. If a mast or any other thing belonging to the vessel be thrown out for the sake of averting a common danger, a contribution is due.

LAW IV.

Callistratus, lib. 2. quæstionum.

Navis onusta. If, in order to lighten a vessel too much loaded, (which being so loaded cannot enter a river or port) some goods are put into the boat, that the vessel may not be in danger either at sea or in the river or port, and if the said boat perishes, those whose goods have been saved in the ship, must come into contribution with those who lost theirs in the boat, in the same manner as if a jettison had been made. This *Sabinus* proves, *lib. 2, Responsorum*. Otherwise if the boat has been saved with part of the merchandize, and the vessel has been lost, there is to be no contribution for the loss of those who lost their effects aboard the ship, because there is no contribution except in case a vessel is saved by a jettison.

Sed si navis. § 1. But if the vessel, having been lightened during a storm by the jettison of the goods of one shipper, is lost in another place, and the goods of some shippers are saved by the divers for a reward, those who saved their goods by means of the divers must contribute to him whose goods have been thrown overboard for the sake of lightening the vessel, as *Sabinus* justly answered. But on the contrary, those who so preserved their goods are not to have a contribution from him whose effects were cast into the sea to relieve the vessel if they should afterwards be found by the divers, because it cannot be said that *their* goods were cast into the sea for the preservation of the ship.

Cum autem. § 2. But if a jettison is made from the vessel, and the goods of some person, which remained on board have been spoiled or damaged, is he obliged to contribute? for he must not be loaded with a double loss; viz. the damage which his goods suffered and that of contribution. But it may be answered that he is to contribute, estimating his goods at their present value, as for instance, goods of two persons were respectively worth twenty pieces, and those of one of them were so damaged by the sea water as to be reduced to ten, he

whose goods remained unhurt shall contribute for twenty, the other only as for ten pieces. We must however consider, while we adopt this opinion, what has been the cause of the damage of the goods, that is to say, whether they have been damaged in consequence of the jettison or by some other cause, as for instance, from their being stowed in some corner where the water penetrated, for in this case they must contribute. But if from the firstmentioned cause, the owner must not bear the burthen of contribution, because he suffered from the jettison itself: Again, what if the goods have been spoiled by being wet with the sea water occasioned by the jettison? But a much more subtle distinction is made, to wit, whether the damage or the contribution is greater, as for instance, these things were worth twenty pieces, the contribution is ten pieces and the damage two; after the deducting the damage the remainder is to contribute. What then if the damage amounts to more than the contribution? As for instance, if the things have been damaged to the value of ten pieces and ought to contribute two? undoubtedly they ought not to bear this double burden. But let us see whether they ought even to contribute? For what is the difference whether I lose my goods by throwing them overboard or have them damaged by sea water? In like manner as you relieve him who lost his goods, so ought you to assist him who has had them damaged by the jettison; and thus answers *Papirius Fronto*.

LAW V.

Hermogenianus, lib. 2. juris Epitomarum.

Amissæ navis. The loss of a vessel is not to be made up by the contribution of those who have saved their goods from the shipwreck. For the equity of contribution only obtains when the ship is saved by a jettison agreed upon in common danger.

Arbore cæsa. § 1. If the mast be cut off, in order to save the ship and goods, the equity of contribution takes place.

LAW VI.

Julianus, lib. 86. Digestorum.

Navis adversâ. A ship disabled by a storm, her rigging, mast and yard destroyed by the lightning, is carried into *Hippona*: and there having hastily purchased new furniture and apparel, sails to *Ostia*, and there lands her cargo in safety. It is asked whether the owners of the cargo are bound to make good the damage of the owner of the ship? I answer, they are not; for this expense was incurred more for the sake of refitting the vessel than of saving the cargo.

LAW VII.

Paulus, lib. 3. Epitomarum Alfeni Digestorum.

Cum depressa. If a ship is lost or cast away, whatever any body saves of his own, he saves for himself, in like manner as what is saved from a fire.

LAW VIII.

Julianus, lib. 2. Ex Minicio.

Qui levandâ. Those who throw any goods out of a vessel in order to lighten her, have not a mind to abandon them as derelict: but they mean to reserve to themselves the right to take them away, if they should find them, or to look for them, if they should suspect where they are: in like manner as a person who throws a burthen on his way, intending soon to come back with others to retake it.

LAW IX.

Ælius. The petition of *Eudæmon* of *Nicomedia* to the emperor *Antoninus*; *May it please the emperor: Having been shipwrecked on the coast of Italy, the revenue officers from the Cyclades Islands seized our property and plundered us of every thing.* To which the emperor answered; *I am indeed the so-*

vereign of the world, but the law is the sovereign of the sea. Let this matter be determined by the maritime law of Rhodes, so far as it is not in opposition to our own law. A similar decision was given by the emperor Augustus.

LAW X.

Labeo, lib. 1. Pithanon à Paulo Epitomatorum.

Si vehenda. If you have undertaken to carry slaves on board of your vessel, and one dies during the voyage, no freight is due for him. *Paulus* says, that in this case we must inquire into the nature of the contract, whether freight was to be paid for those who were shipped on board or for those who were carried to their place of destination, but if the latter is not proved, it will be sufficient for the master of the vessel to prove that the slave was shipped on board.

Si ea conditione. § 1. If you have hired a vessel on condition that she should carry your goods, and the master without being compelled to it by any necessity, and knowing it to be against your will has trans-shipped them into a worse vessel, and your goods perish with the vessel into which they have been lately transferred, you have an action *ex conducto locato* against the master of the first vessel. *Paulus* says, that it is different if both ships have perished in that navigation, without any fraud on the part of the master. The same law will obtain if the master was detained by authority and prohibited to navigate with your goods. Likewise, if the master has taken your goods on condition that he should pay a penalty to you if he did not land them by such a day at the place of their destination, and has incurred the penalty without any fault of his. Of consequence the same law must obtain if it is proved that the master, being detained by sickness, could not navigate. And we must say the same, if his vessel was disabled without any fault or fraud on his part.

Si conduxisti. § 2. If you have hired a vessel of two thousand jars (*amphoræ*) and have shipped jars on board, you ought to pay freight for two thousand jars. *Paulus* says, if

you have hired the whole vessel, you must pay freight for 2000 jars; on the contrary if you have stipulated to pay freight for so many jars as you should ship on board, for then you are only bound to pay for so many jars as you have actually shipped.

Supreme Court of Appeals of Virginia.

APRIL TERM, 1805.

Trytitle lessee of Reed and others against Reed.

[Children born in *Ireland* prior to the *American* revolution, of parents who were *British* subjects, and which children did not become citizens till after our independence was established, cannot inherit real estate, descending previous to the time when they so became citizens; but will, as to such estate, be deemed aliens.]

THIS was an appeal from a judgment of the district court of *Staunton*, rendered in favour of the defendant.

In ejectment brought by *Robert Reed*, *Colin Reed*, and *Hugh Ballentine* and *Frances* his wife, as heirs at law of *Robert Reed*, deceased, against *Margaret Reed*, for lands lying in the county of *Augusta*, the jury found, in substance, a special verdict, tracing the title of the lands in question from the original patentee until they were vested, in fee-simple, in *Robert Reed*, husband of the tenant in possession; that *Robert Reed* was seised and possessed as the law directs until the time of his death, in *October*, 1787, when he departed this life intestate and without issue, leaving a widow, *Margaret Reed*, who had continued in possession ever since. The jury also found that *Robert Reed*, who died so seised and possessed, was the son of *John Reed* of the kingdom of *Ireland*, and that the lessors of the plaintiff are the sons and daughter of *John Reed*, the only brother of the whole blood to the said *Robert*, and that they were born prior to the year 1770: that three of the lessors of the plaintiff removed from *Ireland* to this commonwealth in the year 1784, and the other followed them about two years afterwards; that *Robert Reed*, one of the lessors of the plaintiff, was enrolled in the militia

in the county of *Augusta*, prior to the death of *Robert Reed*, the ancestor, and attended musters as a militiaman; but that he did not take the oath of abjuration and allegiance until the 21st of *November*, 1787; that *Hugh Ballentine*, another of the lessors of the plaintiff, was living on his own land in the county of *Greenbrier* in 1786, had been esteemed a good citizen for several years previous to the death of *Robert Reed*, the ancestor, and had been enrolled and served in the militia of that county, but that it did not appear that he had taken the oath of allegiance before the 28th of *November*, 1787. With respect to *Colin Reed*, the other lessor, it was not found that he had ever taken such oath. They further found that the lessors of the plaintiff came to *America* prior to the death of *Robert Reed*, in consequence of letters from him to his brother *John*, stating that he was in possession of an ample fortune, without issue, and requesting that he would send in some of his children to heir it; that in virtue of this invitation the lessors of the plaintiff had come to *Virginia*, and were recognized by *Robert Reed* as his relations, children of his brother *John* of *Ireland*; who, it was further found, departed this life in the year 1785 or 1786, a subject of the king of *Great Britain*. They also found an act of the general assembly of *Virginia*, passed on the 14th of *December* 1789, vesting the real estate whereof *Robert Reed* died seised in *Margaret Reed* and her heirs. The conclusion is in the usual form; finding the lease, entry and ouster, and that if the law be for the plaintiff, then they find the lands in the declaration mentioned, &c. but if for the defendant, they find for her, &c.

The district court gave judgment for the defendant, from which an appeal was taken to this court.

The following luminous opinion was delivered by Judge *Roane*, in the above cause, which, as to the general result, was the opinion of the court.

Judge ROANE. The principal question arising out of this special verdict is, whether the lessors of the plaintiff who were born in *Ireland* prior to the year 1770, and who did not become citizens of this commonwealth until after the descent

of the lands in question, were at the time of such descent disabled to take and hold lands within this commonwealth, and to bring any real or personal action concerning them.

Such being the disabilities under which an alien labours by the common law, the question may be more succinctly stated to be, whether, in respect of the lands in question, the plaintiffs are to be regarded as aliens or not.

I will consider this question:

1st. In relation to the doctrines of the common law of *England* as handed down to us in the reports and treatises on the subject, with no other variation than what arises from the erection of a new government in *Virginia* in 1776.

2dly. I will inquire how far those doctrines are controlled or affected by the principles of the revolution, and the provisions of our constitutional and legislative acts.

And 3dly. Whether any and what effects have been produced on this question by the treaty of peace of 1783: The treaty of 1794 is entirely out of the question, as being subsequent to the commencement of the right now claimed by the plaintiffs.

Under the first view I will remark, that the terms "alien" and "alien born" are used *synonymously* in the *English* law books; for it being an established principle of the *English* law, that a subject born can never shake off his natural allegiance,^(a) it follows, that none are *there* considered aliens, but those who are born so.

The terms "alien" and "alien born" and "subject" or "citizen" are, in their nature, relative: and to what else can they have relation, what else is their correlative, but the sovereignty or government where the discussion is?

The question then, in this case, is, more particularly whether the plaintiffs were at the time of the descent cast, aliens in respect of the commonwealth of *Virginia*.

This idea is entirely borne out by the *English* cases themselves. In *Calvin's* case, 7 *Coke* 1. the question was "whether the plaintiff, who was born in *Scotland* after the descent

(a) 1 Black. 369. 7 Rep. 25 a.

of the *English* crown to *James I.* was an alien born, and consequently disabled to hold any real or personal action for lands within the realm of *England*:"(b) but in the same case it was adjudged that "whosoever is an alien born is so accounted by law in respect of the king of *England*."(c) The question therefore in *Calvin's* case was more particularly whether he were an alien born or not in respect to the king of *England*. Am I not therefore correct in saying that the present question is, whether the plaintiffs were aliens or not in respect of the commonwealth of *Virginia*?

An idea has sometimes been urged that all those who are born subjects of the same common allegiance can never be considered as aliens in relation to each other.(d) I admit the truth of this position in every case where the plaintiff can shew himself to be no alien to the sovereign where he sues; I deny the truth of it in every other case: in other words, the relation which existed between the two individuals is wholly immaterial and foreign. I bottom this position upon *Calvin's* case itself. I have already said from that case, that an alien born is so accounted "in respect of the king;" and I will now add from the same case, "that this appeareth from the pleading so often before remembered, that he must be *extra ligeantiam domini regis* without any mention making of the subject."(e) I might further add from the same case, that "*nec eælum nec solum sed ligeantia et obedientia*" make the subject.(f) If allegiance gives the criterion, must we not unavoidably have reference to the government, and decide whether or not this allegiance exists? Under the position now controverted, the universal plea in cases of alienage would be wholly improper, (and well established pleadings are good evidence of the law); the inquiry would be called off from the question of allegiance or not, to the question of a common birth between the ancestor and heir; and this absurd consequence would follow, that a recovery might be had in any country, by persons born in any other country, and not naturalized in it, the plaintiff making out his case in this latter respect. The same

(b) 7 Co. 25 a. (c) 7 Co. 25 a. (d) See Wythe's Reports, *Farley v. Farley*. (e) 7 Co. 25 a. (f) 7 Co. 6.

person might also sustain one action and fail in another, in the same country and at the same time, according as the person, under whom he claims, might or might not have been born under a common allegiance with him.

In *Calvin's* case (which I principally resort to, because it contains the whole doctrine upon this subject,) a definition is given of an alien, and it is "that he is a subject that is born out of the allegiance of the king, and under the legiance of another:"(g) this definition presents to us the only criterion whereby to discern who an alien born is. I say an alien *born*, because in this country a citizen born may become an alien by expatriation; and even in *England* a subject born may become an alien by the act of the government, though not by his own act.

Much indeed is said in *Calvin's* case about the "time of the birth being the essence of a subject born, &c.;"(h) but it is evident that the time of the birth is no further material than as explanatory of the principal question, viz. whether born within the allegiance of the king or not? This principal question therefore may be regarded as the *sole* one upon the subject. It is further said in that case, that "natural legitimation respecteth actual obedience to the sovereign at the time of the birth;"(i) but this is still also referring to the same standard. It is here to be remarked, that the result in *Calvin's* case was to discriminate between a *Scotch antenatus* and *postnatus* in respect of a legitimation in *England*: the time of the birth was therefore a very material ingredient of the principal question, and may be regarded as the turning point on which that question depended. It is no wonder therefore, that, in a very long report, and one containing an abundance of *extrajudicial* matter, the same idea may be exhibited perhaps in different points of view, and be sometimes so indistinctly expressed as to cause some embarrassment.

In the same case it is adjudged, that "the usual and right pleading of an alien born doth lively and truly express and describe what he is," and that this pleading is both exclusive

(g) 7 Co. 18 b.

(h) 7 Co. 18 b.

(i) 7 Co. 27 a.

and inclusive, viz. *extra ligeantiam domini regis, &c. et infra ligeantiam alterius regis.* (k) I can find no principle of the common law, which will exempt a person, against whom the above plea will truly apply, from being considered as an alien *born*. I say of the *common law*; because by the English statute of 29 C. II. c. 6. an exception is made to this rule in a particular case, (l) and perhaps there may be other statutory exceptions. I hold it, therefore, to be an universal proposition, that, by the principles of the *English law*, no man can sustain a real action, unless he either shews that this plea is not true with regard to him; or, that being true, he forms an exception to it by virtue of some statutory provision, or by having, subsequent to his birth and before the accruing of the action, become legitimated in the country where the action is instituted; or unless his title to the land is preserved to him by treaty or otherwise, and the right of suing is preserved by necessary consequence.

Some supposed exceptions have been confidently stated from the *English books*, but I flatter myself I shall be able to shew that they *all* fall strictly within my positions. I will now proceed to examine them; and first, great stress has been placed, on the part of the plaintiffs, on a resolution in *Calvin's case*, 27 a. (m) The resolution is as follows, viz. "And as to the fourth, it is less than a dream of a shadow, or a shadow of a dream; for, as it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth: for, as the *antenati* remain aliens as to the crown of *England*, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent, subsequent, cannot make him a subject to that crown to which he was an alien at the time of his birth; so, albeit, the kingdoms (which almighty God of his infinite goodness and mercy divert) should by descent be *divided* and governed by *several kings*; yet it was resolved, that all those who were born under one natural obedience while the realms were united under one sovereign, should remain natu-

(k) 7 Co. 16 b.

(l) 1 Bl. 372.

(m) 7 Co. 27 a.

ral born subjects and no aliens; for that naturalization due and vested by birthright, cannot, by any *separation of the crowns*, be afterwards taken away; nor he that was by judgment of law, a natural subject at the time of his birth, become an alien by such a matter *ex post facto*. And in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque regis*, as *Bracton* saith, in the before-remembered place, *fol. 427. Sic ut, &c.*"

An objection had been made in that case by the defendant, that, "if *postnati* were by law legitimated in *England*, what inconvenience and confusion would follow, if the royal issue should fail, &c. whereby the kingdoms might again be divided."⁽ⁿ⁾ The judges, taking up this supposed case, gave the answer to it, which is above quoted. The objection having reference to a supposed inconvenience in *England*, the answer to it must be considered under the same restriction. The judges are here of opinion, that in case of dismemberment of the two kingdoms, and being governed by *several kings*, the *postnatus* would still remain legitimated in *England*. This supposed case, however, differs from the case before us in the following particulars: 1st, The *Scotch postnatus* in that case was born under the allegiance of the *king of England*. 2dly, This allegiance, being by the *English* decisions, perpetual, *continues* as the *king of England continues*, notwithstanding the *postnatus* may have fallen under a different power. 3dly, Consequently he may truly be said to be in the language of the case, *ad fidem of the king of England*; and 4thly, The general plea before stated, will not exclude this *postnatus*, for it cannot be said of him that he was born *without* the allegiance of the *king of England*.

But, in the case before us, 1st, The plaintiffs were not born under the allegiance of *this commonwealth*, nor had contracted such allegiance at the time of the descent in question. 2dly, There was consequently no *existing* allegiance due from them to it, even on the *English* principle, nor could they be truly said to be *ad fidem* with respect to it; and 3dly, The general

(n) 7 Co. 26 a.

plea before stated would truly have applied to them in both its members. The above resolution, it is also contended, will go to sustain a claim *e converso*, viz. by an *English postnatus* in *Scotland*, supposing the same common law to exist there, after the supposed dismemberment; and this view of the case is supposed to have a strong analogy to the case before us. I have already said that this resolution should only be considered with reference to *England*; in relation to a discussion in *Scotland*, it was no case before the court; it was wholly extrajudicial: but upon principle I cannot see a difference. The *English postnatus* was as much born under the allegiance of the king of *Scotland*, as the *Scotchman* was under that of the king of *England*. The kingdom of *Scotland* was (before the act of union) wholly independent of that of *England*, and *James's* character of king of *Scotland* was not merged in that of king of *England*. After the supposed separation, a king of *Scotland* would still exist; there would be a continuation of the same government; and the allegiance due to the king of *Scotland* at the time of the birth (before the separation) would continue to that king, after that event. It might truly be said of the *English postnatus*, suing in *Scotland*, that he was born under the allegiance of the king of *Scotland*, and was *ad fidem* with respect to him; and the general plea, before stated, would not truly apply to him. The effect of this supposed dismemberment therefore, would not be to destroy the tie of allegiance by destroying the correlative of the subject, by establishing a different government on the ruins of that government to which the allegiance was originally due; but to transfer and continue to the persons of two kings, that allegiance which before was due to one. I shall presently attempt to shew, that, under the doctrines of those times, (as derived from a feudal origin,) it was no novelty for a subject to owe allegiance to two or more sovereigns. In this supposed case, therefore, *quacunque via*, there would be, according to the *English* decisions, an existing allegiance due to the king in either country, which would capacitate the plaintiff to sustain the action. This supposed case of a dismemberment therefore, entirely extrajudicial and hypothetical as it is, only pro-

ceeds upon the idea of a *separation of the crowns*, of a descent to *several kings*; it does not put the case of a destruction of the kingly government. It goes upon the idea of the continuation of the *same government*, though under *different kings*, and a consequent *continuation* of the original allegiance: it is therefore entirely different from the case of the destruction of the tie of allegiance by the erection of a *new and different* government upon the ruins of the old. Every position to be found in the *English* cases of this era, proceeds, at most, upon the former idea. The right of revolution and erecting a new government was not an admitted doctrine of the day: it was incompatible with the *jure divino* ideas which then prevailed. May we not then say with confidence, that the case now before us had never entered the minds of the *English* judges? And that their decisions, even where general, shall not be applied to a case in which the grounds and reasons of their actual decision fail us, and which those judges most certainly never contemplated. These same ideas must be borne in mind, while we examine a quotation from *Bracton*, 427. which is also much relied on, on the part of the plaintiffs. That quotation says, "there are *some Frenchmen* in France *ad fidem utriusque regis*, and always were so, both before and since the loss of *Normandy*, and who plead here and there, because *ad fidem utriusque regis*." (o) The *Frenchmen* here alluded to were *Normans*, born under the allegiance of the king of *England* whilst he had possession of *Normandy*. It is here to be remarked, that the loss of *Normandy*, which *Bracton* speaks of, happened in the reign of king *John*, and in the year 1205; (p) and that *Bracton* wrote in the reign of *Henry III.* (q) which reign began in the year 1216: so that this quotation evidently means those *Normans* born whilst *Normandy* was subject to *England*, very many of whom may be reasonably supposed to have been yet alive when *Bracton* wrote. Because they were born under the allegiance of the king of *England*, they remained legitimated in *England*, by the *English* doctrines, even after the loss of *Normandy*, and were still consi-

(o) 7 Co. 27.

(p) 2 Hume, 55.

(q) 7 Co. 20 b.

dered as *ad fidem* with respect to the *king of England*; but they were also born under the allegiance of the *king of France*. *Normandy* was a fief holden under him: the king of *England* was, in respect of it, a vassal, and the king of *France* his liege lord; and there are many instances to be found in the history of both nations of the kings of *England* doing homage to the *French* monarchs, in respect of the possessions, which they held on the continent. By the feudal law, "*allegiance*, properly speaking, is due to the lord paramount or sovereign." (r) Under this idea, therefore, those *Normans* owed *allegiance* emphatically to the *French king*; and, in consequence of this allegiance it was, that they were, by the principles of the common law, permitted to sue in *France*. In illustration of this position we find it resolved in *Calvin's case*, "that those who were born in *Wales* before 12 Ed. I. whilst it was a distinct kingdom, were natural born subjects, (as to *England*) because holden of *England*, or within the fee of the king of *England*." (s) These *Welchmen* therefore, might, as well as the *Normans*, sue in both countries, and for the same reason, to wit: *because, and only because*, they owed *allegiance* to both sovereigns. Whilst I am upon this subject of allegiance, I will refer to 1 *Hale's P. C.* 58. *et. seq.* who fully and elaborately proves, that there might be, and really was, in many instances, *several* allegiances due from a subject to *several* sovereigns. Thus, in page 66, he tells us, that when *Henry II.* made his eldest son king of *England* in his lifetime, so that there was *rex pater* and *rex filius*, and when *William* king of *Scotland*, had, at the same time, done homage to *Henry* the son for his kingdom, saving the faith due to *Henry* the father: these several kings, though *subordinate* in respect of each other, were *sovereigns* in respect of their subjects; and the subjects of *Scotland* owed an allegiance to *their king*, saving their faith to the kings of *England*, father and son, and an allegiance to *Henry* the son, saving their faith to *Henry* the father. (t) It follows, that these *Normans*, referred to by *Bracton*, owed, at their birth, an allegiance to *both kings*, (*viz.* of

(r) 1 Bl. Com. 367.

(s) 7 Co. 22 b.

(t) 1 Hale, 60.

England and France.) and this allegiance continuing during their lives, upon the principles of the *English* law, they could always be said to be, in the language of the case, *ad fidem utriusque regis*. *Blackstone*, in confirmation of this position, of owing several allegiances, admits, that a natural subject of one prince, may, even by his own act, subject himself to *another*, though he may thereby bring himself into straits and difficulties.^(u) Without inquiring into those difficulties, or differing the case of two several allegiances, produced by a revolution, or an act of the government, from that produced by the act of the party himself, this quotation is decisive to shew that a natural born subject may owe allegiance to more sovereigns than one, even since the destruction of the feudal system. Am I not correct, therefore, in accounting for all these supposed exceptions, by shewing, that in every instance there was an *existing allegiance* due from the party suing to the respective sovereigns?

I have said, and I repeat, that no position by any of the *English* judges was predicated upon the idea of the erection of a *new* and *different* government. If there be any such, let it be produced. Are we not then to consider ours as a *new* case, not contemplated nor provided for by the *English* decisions. The reign of *James I.* was not an era when the judges were independent enough to have dared, or would have been permitted (see 11 *Co. Rep.* passim, to prove this) to argue upon a supposition of a destruction of the kingly government. That loyal and devout spirit, which caused the judges in *Calvin's* case (27 *a*) so much to deprecate a descent of the kingdom to several kings; that slavish devotion of the judges to the will of king *James*, which, in relation even to this very case of *Calvin*, *Hume* remarks with censure, in more passages than one of his history (see vol. 5. 554, and vol. 6. 169.), while it goes far to destroy the authority of the decision, would not have permitted them for a moment to contemplate the idea of the erection of a popular government upon the ruins of a throne, deemed, in the *mania* of the times, to have

(u) *Tucker's Bl.* vol. 1. part 2. 370.

been held by divine authority. In the total absence therefore of a case of this kind, either actual or *contemplated*, in the *English* authorities, we must reason *only* from analogy. It is held in *Cowper's Reports*, page 208, "first, that a country conquered by the *British* arms becomes a dominion of the king in right of his crown, &c.; and, secondly, that the conquered inhabitants, *once received* under the king's protection, *become subjects*, and are universally to be considered in that light, and not as enemies or aliens."^(v) And in 1 *Bl. Com.* 103, the reason of this privilege is given: it is, "that in order to put an end to hostilities, a *compact* is, either expressly or tacitly, made between the conqueror and conquered, that, if they will acknowledge the victor for their master, he will treat them *in future* as subjects and not as enemies."^(w) Now, nothing can be clearer than that if the whole territory of the belligerent nation is not conquered, the inhabitants of the unconquered part continue to be, in respect of the sovereign of the part conquered, enemies and aliens: enemies during the war and aliens after the peace. They do not become subjects of the conquering power, and are not to be considered in that light, because they have not submitted to the conqueror nor by *any compact* entitled themselves to the privileges of subjects; and yet they were *once inheritable* in the country conquered, and can say as much, as the present plaintiffs can say in respect of the territory of *Virginia*, viz. that at *the time of their birth* they were legitimated here. The people themselves who are conquered are legitimated by virtue of the *implied compact* only, and cannot claim such legitimation by the paramount title of having been at the time of their birth inheritable in that territory under *another* sovereign. If, then, the territory of *Virginia* had been conquered from *Great Britain*, in the ordinary way, by an *existing* sovereign, there is no doubt but that, upon the foregoing principles of the common law, the *residuary* subjects of the *British* empire, not residing here, nor contracting an allegiance to the conquering power, would

(v) *Cowp.* 208.

(w) 1 *Bl.* 103.

have remained *aliens*, as to the sovereignty established here by such a conquest.

I confess I cannot see a difference between that case and ours. I see no difference in this respect between a change of the sovereignty of *Virginia* effected by an *existing* sovereign and by a sovereign merely *coeval* with the change; and I should be sorry to be obliged to admit, that a people, forming a government by compact, have not as ample power both to confer rights upon the members of such compact, and to exclude the rest of the world from a participation of them, as a conqueror dictating at the point of his sword: nor can I agree that the natural (though silent) operation of a compact-government, is less efficacious, in either respect, than that which, as to those particulars, is produced by a conquest. I conclude therefore that, according to the acknowledged doctrines of the *English* common law, all the beforementioned supposed exceptions are referrible to a principle which does not exist in our case, I mean that of a continuing and existing allegiance; that the case before us, of the erection of a different government, and the destruction of the ancient tie of allegiance, had never entered the minds of the *English* judges, when they were so copiously and so extrajudicially, (in *Calvin's* case) dealing out their doctrines on this subject; that, if it had, they could not have sustained the pretensions of the plaintiffs in the present instance without revolting against and overthrowing their own admitted principles; and that, as far as we can judge by analogy, the principles of the *English* law authorise us to say, that, in the actual case before us, an *English* court itself would render judgment in favour of the defendant.

This view of the subject supersedes the necessity of saying much on the second branch of my inquiry; namely, how far the *English* doctrines on this subject are controlled by the principles of the revolution and the provisions of our constitutional and legislative acts. If the actual principles of the *English* law will suffice for the defendant in the case before us, that defendant holds a much stronger ground in this country, and in this court, which must reject such of those

principles as are *heterogeneous* to our republican institutions. All the *English* decisions upon this subject are bottomed upon three main principles, neither of which can be admitted in the case before us. They are, 1st, That allegiance is perpetual, and cannot be renounced by the subject. 2dly, A supposition of the continuation of the *same* sovereignty, to which this perpetual allegiance was originally due; and 3dly, The character of that allegiance by the *English* law is, that it is due to the *person* of the sovereign, and not to his political character.(x) As to the last position, we have happily no king to whose sacred *person* this allegiance may be said to be due. It is the *government* only which affords protection to the citizen, and to this government only, which is perpetually changing as to the persons who administer it though itself is permanent, the allegiance of the citizen is due. As to the second position, I need not repeat that the *Americans* have erected a *different*, as well as a *new* government. The first position requires rather more consideration. The decisions by the *English* courts at *remote* and arbitrary periods, and the *municipal treatises* of that country bottomed thereon, have denied the existence of a great natural right: I mean the right of expatriation. It is the character of the common law that it draws from various sources, is compounded of parts of various laws and codes, and refers to various arts and sciences. It is also a maxim of that law that "*cui libet in sua arte credendum est;*" and Lord *Coke* tells us, somewhere, that it is better "*petere fontes quam sectari rivulos.*" Shall we not, under the sound sense of these maxims, correct the mistakes of a municipal code, touching a question of general law, by referring to the fountain from which itself has drawn? Shall we decide a question of *natural right* and of *general law*, by referring to the most approved writers, and to the sense of the *world* on that subject, or shall we be governed by the particular municipal codes of a *particular* country? I believe, that this position of the *English* judges has *always* stood condemned by the most enlightened writers upon *natural law*. I mean

(x) Tuck. Bl. vol. 1, part 2, p. 371.

not (as being unnecessary in the present case) to investigate this point at this time; but I beg to refer to the new edition of *Blackstone*, vol. 1, part 2, note *k*, p. 90, where the editor has elaborately discussed the subject, and his conclusions seem fully to sustain my position. See also *Vattel*, p. 170. § 220. p. 172. § 223. I rather chuse to refer to the sublime principles contained in the declaration of independence, and in the *Virginia* bill of rights, consecrating the right of expatriation; to the memorable assertion of that right by the *American* people, who, sword in hand, expatriated themselves from the government which had tyrannized over them; to the limited and qualified adoption of the common law as a part of our code; and to that dignified act of the *Virginia* legislature, which prescribed the mode of effecting an expatriation, but did not presume to *bestow* the right.(y) While these great authorities destroy *some* of the main pillars, on which the *English* doctrines on this subject are founded, the *Virginia* legislature, by several acts, have declared who shall be deemed citizens and who aliens. Under those acts, the plaintiffs, at the time of bringing the action in question, must have fallen into the *latter* class. It has been supposed by some that, inasmuch as the act of *May* 1779, ch. 55., after declaring who shall be deemed citizens, declares that *all others shall be deemed aliens*; and, as in a subsequent act (*October* 1783, ch. 16.) on the same subject, this latter declaration is *omitted*; that the last law is to receive a more enlarged construction in relation to aliens than the former.(z) These answers occur to me however to this position. 1st, As every man, according to the *English* doctrine, is either "an alien born, or a subject born,"(a) and, according to those doctrines, as here received, is either an alien or a citizen, it was perhaps a work of supererogation, after declaring who, and who only, should be deemed citizens, to declare also who should be deemed aliens; and 2dly, that position proves too much, for it would equally legitimate the subjects of *all other countries* in the world as of *England*, whereas the same authority seems to think that

(y) Oct. 1783 ch. 16. (z) *Tuck. Bl.* vol. 2, p. 62. Append. (a) 7 Co. 601.

the omission was produced by the intermediate conclusion of the treaty of peace between *America* and *England*. To say nothing of the absurdity of the legislature's doing away, in the gross, the disabilities of alienage, when at the same time it was granting, in detail, the right of citizenship, it is contrary to all fair deduction to infer a conclusion which is very general and extensive from a cause which is limited and particular. Such is the construction which I deem myself obliged to adopt in the present instance. If the adherence of the *British* subjects to their own government, on the erection of our government in 1776, has thrown them into the class of *aliens by election*, a definition I think properly applied to them in the new edition of *Blackstone*, (see vol. 1. part 2. append. p. 102.) they stand on as good a footing as our own expatriated citizens. Subjects of foreign nations have no reason to complain at receiving the same measure as is dealt out to our own citizens, unless they have *ulterior* rights secured by treaty. Such a treaty would be neither natural nor reasonable; but if such a one exists, it must probably have its effect. Whether there be any such treaty-rights in the present instance we shall presently inquire. These *British* subjects have, however, less pretensions to sue than our own expatriated citizens; for the latter can say, which the former cannot, that they were *once* under the allegiance of the commonwealth of *Virginia*; nay, in some instances that they were *born* under the allegiance of this commonwealth. Why then shall we not consider them as expatriated, in respect of the commonwealth of *Virginia*?—expatriated by having refused to yield to us their allegiance, and to unite their destiny with ours.

I have thus chosen to consider the pretensions of the *antennati*, or, in other words, the common law doctrines of legitimation, somewhat at large; because these doctrines have been often pressed upon this court, and particularly in the case of *Fairfax v. Commonwealth*, and have received countenance from the opinion just delivered. In all the elaborate discussions, which have taken place in this court upon this subject, there has been heretofore no difference of opinion upon this point as far as I have understood the judges: and our late

venerable president, who did not sit in those causes, has informed me, since they were determined, that he entirely agreed with the court in opinion upon this subject. But for the foregoing considerations, I might perhaps have saved myself this trouble; for it appears that both the treaty of peace and the treaty of 1794 have repudiated the pretensions of the *antenati*: the latter treaty does not immediately apply to this case, and would not now be mentioned, but as corroborating and explaining the former. That treaty abandons those pretensions, by setting up a new criterion, viz. the actual *holding* of the property at the epoch of its date. In setting up this epoch, and establishing a new criterion in relation to the *antenati*, (if it regards them at all) that treaty enlarges the common law pretensions, which respect the period of our actual separation from *Britain*; and by superadding the other requisite, (an *actual holding*) it also abridges those pretensions for all the residue of the lives of the *antenati* subsequent to the date of the treaty. In thus enlarging and abridging the common law pretensions of the *antenati*, am I not correct in saying that the treaty of 1794 has set up an entirely new rule, and has abandoned those pretensions altogether? So, with respect to the treaty of peace, the case is precisely the same, if it be considered as relating, at all, to the laws of alienage of the several states, and the epoch of its signature be resorted to as protecting from those laws the property *then holden*; and this perhaps is the most that has hitherto been contended for. But if we carry the exemption still further, if we contend that that treaty protects *British* property in this country through all time, there is still less reason to contend for the rights of *antenati*, or, rather, an infinitely stronger reason for their abandonment. In that case, which is the present case, (for the descent in question was cast in 1787) a bolder and stronger ground is taken in favour of *all British* subjects, who may chance at *any time* to purchase or inherit lands in this country. It is most clear then that both those treaties (if the treaty of peace has any relation to the subject) have immolated this pretension of the *antenati*, (if it would have otherwise applied in this country) by taking a new

ground on the subject. This the *British* government was fully competent to do on the part of its subjects, however inadequate the power of congress, in forming the treaty of peace, might be, to affect or destroy the municipal rights of the several states.

We come next to consider, somewhat more at large, the application and effect of the treaty of peace in arresting the operation of the laws of alienage of the several states.

Under this head I will consider, for greater perspicuity, the rights of *British* subjects in a fourfold point of view. I say *British* subjects, and not *antenati*, because that ground of title, as I have just endeavoured to shew, is entirely abandoned by that treaty. I will consider those rights, first, In relation to land actually holden by such subjects, in this country, at the epoch of our separation, or declaration of independence: a right of this sort not existing in the present case, this topic will be but slightly and incidentally touched. 2dly, In relation to lands purchased by such subjects in this country, since the epoch last mentioned, and which, if they be aliens, enure to the commonwealth by way of "forfeiture." 3dly, In relation to such lands, as, since that epoch, have descended to such subjects, and which, if they be aliens, enure by way of "escheat." Every thing said on those two points will apply, *a fortiori*, to the case now before us, being that of a *descent* cast, *since the date of the treaty*. And 4thly, In relation to the capacity of such subjects, to sue for lands so holden, purchased, or descending, as the case may be. In laying down these points, I must be permitted to cling with equal pleasure and pertinacity to the epoch of our declaration of independence, rather than that of the treaty of peace, as erecting us into an independent nation; as affording that precise point of time, to which alone the treaty applies, (if it applies at all) in arresting the laws of alienage of the several states; I must cling to this epoch, because the *United States*, on that day, for the many weighty reasons then declared, dissolved for ever the connexion antecedently existing between us and *Great Britain*; because, in the emphatic language of the *Virginia* constitution, the many acts of misrule, therefore, com-

mitted by the *British* king, had dissolved his government over us: because the whole fabric of the old government was in truth totally annihilated and destroyed, by that king's withdrawing his protection from us and our abjuring our allegiance to him: and because the *British* nation itself has conceded this point by admitting, in the treaty of peace, (Art. 1.) that "it treats with the *United States* as free, sovereign, and independent states," and not as revolted subjects; thereby clearly relating in that treaty to the era of our declaration of independence. Away then, with that absurd and slavish doctrine which would derive every thing from the recognition and bounty of the *British* king; would postpone for nearly eight years our title to rank among the independent nations of the earth, and degrade, for the same period, all our laws and resolutions to the level of usurped and unauthorized acts. We date our independence from this era, on grounds paramount to any thing in the power of that king to grant or to do; we treated with him for *peace*, but not for *independence*; we asked him to put an end to the war, but not to sanction a government already established upon the only just basis, the consent of the governed.

I would construe the *general* words of the treaty to relate to this epoch, not only for the abovementioned reasons, but because in truth that great event, in connexion with the laws of alienage of the several states, drew a prominent line of distinction in relation to lands acquired in this country by *British* subjects. While it exhibits all lands previously acquired and then holden in this country, as being lawfully acquired under the faith of existing laws, and entitled to the attention of the contracting parties, it throws into the class of *nullities* and of illegal and unauthorized acts, all posterior acquisitions of lands by *British* subjects. Powerful reasons existed therefore, on this ground, for embracing the epoch of our independence, rather than that of the treaty, for applying that instrument to the arrestation of the laws of alienage of the several states, admitting, for the present, that it relates at all to such laws. On the part of the *United States* the great considerations just stated, (to say nothing of others, which

will be presently noticed,) must have had great weight; and the *British* king might, on his part, (while he admitted himself bound to treat for a guaranty of lands fairly acquired by his subjects in this country before that epoch) have justly considered himself absolved from any obligation to *create* or at least *enlarge* titles in favour of his subjects to support and *extend* that nullity of an interest acquired here, by them, after the *commune vinculum* was broken.

In contemplating the effect of the treaty of peace upon the case before us, I will first consider, as being a stronger case for the plaintiffs than that of a right accruing by "escheat," the right of the commonwealth, by way of "forfeiture," to lands purchased by *British* subjects since the era of our independence. The words of the treaty, which are supposed to have an effect on the present question, are that "there shall be no future confiscations made." (Art. 6.) What is the import and extent of the term "confiscations" here used?

The right of the commonwealth to lands purchased by an alien is an ordinary right derived from the common law. It exists at all times; it is independent of, and does not arise out of, a state of war. In the present case, it resulted to the commonwealth from the establishment of a new government here, and the nonaccession of the plaintiffs to that government prior to the commencement of their claim. Although in fact the plaintiffs were enemies to this country from the commencement of our hostilities with *Britain*, they were not, legally speaking, *aliens*, until the erection of our new government. Anterior to that event, the right now in question could not have resulted to the commonwealth. So, on the other hand, if the erection of our new government had preceded or been unaccompanied by a state of war, the right in question would have resulted, as well prior as subsequent to the existence of hostilities. Therefore it is that I say this right does not arise out of a state of war: it results from a mere municipal regulation. It accrues, not because the person purchasing is an enemy, but because he is an alien. It is not a right pointed against the subjects of a particular power, with whom we may chance to be at war, but against the subjects of all foreign

nations whatsoever. This right is by the common lawyers technically denominated a "forfeiture." "Forfeitures of lands and goods for offences," (and this right is founded on the offence of an alien in presuming to purchase lands contrary to law),(a) says sir *William Blackstone*, "are called by the civilians *bona confiscata*, because they belonged to the *fiscus* or imperial treasury, or, as our common lawyers term them, *bona forisfacta*."(b) Indeed Lord *Coke* seems, in one passage, to consider "confiscation" and "forfeiture" as synonymous terms.(c) And the author of the *Commentaries* appears also, in a few passages of his work, to have used the term "confiscation" as descriptive of a forfeiture into the treasury; but, keeping in view the distinction which this elegant and accurate writer has taken between the terms as above stated, the one being a civil law and the other a common law term, and finding that he has expressly treated of the right now in question in a chapter headed "Title by Forfeiture,"(d) I must conclude that the technical and appropriate term descriptive of this right is *forfeiture*, and not *confiscation*." At least it must be granted, and that is sufficient for my purpose, that the former is a much more usual and proper term than the latter to designate the right in question. I urge it, as a very respectable authority in favour of this opinion, that the constitution of *Virginia*, in transferring *this* among other rights from the king to the commonwealth, uses the terms "escheats, penalties and forfeitures," without making any mention of "confiscations."(e) I admit that, where the term confiscation shall occur in a treatise or instrument relating only to the common law, it shall there, from obvious necessity, be taken as synonymous with "forfeiture;" and, indeed, in any other treatise or instrument, where the term may not otherwise be satisfied, or where it appears evident it was intended to have that extensive signification. But on the other hand in instruments which concern the civil law, or the *jus belli*, it is reasonable to tie up the meaning of the term confis-

(a) 1 Bl. Com. 372. 2 Bl. 274.

(b) 1 Bl. 299.

(c) 3 Ins. 227.

(d) 2 Bl. 267.

(e) Art. 20.

cation to forfeitures of that kind, or rather to understand the word in its proper and legitimate signification: it would be unnatural and unnecessary in that case to extend it so as to comprehend forfeitures arising only from the common law. Besides this ordinary and municipal right of forfeiture, there is, as I have before said, an extraordinary one accruing to belligerent nations of confiscating the property of their enemies. This right does not await and attend on the contingent event of a purchase by or descent to an alien; it affects property then actually holden by the enemy. It is not carried into effect by the ordinary course of the municipal laws; the property is seized and confiscated by an extraordinary act of the government of the belligerent nation. It is seized, not because it is the property of an alien, but of an enemy. This right is technically and properly denominated a right of confiscation: I know of no other term which will properly designate it. Here, then, are two senses in which the term confiscation may be used. The one, (to omit its civil law signification) a restricted sense, going merely to a seizure by a belligerent nation in right of war: the other, an extensive sense, and meaning not only what is just mentioned, but further, a mode of acquiring property by the commonwealth under a permanent municipal regulation: a sense extensive enough, not only to repeal the general laws of alienage of this commonwealth in cases like the present, but also (if not restrained by other considerations) to remit perhaps all forfeitures whatsoever incurred in this country by *British* subjects or refugees by crimes or otherwise.

Let us inquire in which sense this term was intended to be used in the article in question? This article is contained in a treaty of peace. "A treaty of peace," says *Vattel*,^(f) "naturally and of itself relates only to the war which it puts an end to; and therefore it is only in such relation that it is to be understood." Such a treaty therefore does not naturally relate to a mere municipal forfeiture or regulation in no manner dependent on or produced by a war. This construction is much strengthened in the present

(f) *Vattel*, p. 34.

case before us, which would throw the *price of peace* in the present instance, upon some of the states in case of others? upon those states, which kept up the laws of alienage as incidental sources of revenue, in favour of such states wherein no such law existed.

If, by the 9th article of the compact aforesaid, the powers expressly specified and delegated to congress are only those of peace and war, and other powers of an *external* nature relating chiefly to an intercourse with foreign nations; shall we adopt a construction in the present instance which will depart from the *general character* of those powers, and invade a right of the several states entirely of an *internal* and municipal nature?

But, independently of these considerations, I have supposed the word "forfeiture" to be a more proper term than "confiscation" to extinguish the right now claimed. The *English* law and ours are precisely the same on this subject. Nay, I have even taken my ideas upon the subject entirely from the *English* authorities. As the *English* commissioners are not to be supposed ignorant of the real powers of our government, neither can they plead such ignorance in relation to their own laws, or technical terms, in forming the treaty. If the right now in question had been intended to be extinguished, would not the most appropriate terms have been used, especially in an instrument which, of itself, does not naturally reach that right? As these commissioners must have known, and they were even warned, (as the aforesaid documents shew us) of the incompetency of congress to affect the municipal polity of the several states, would they not, at least, have used the strongest and most unequivocal terms to effect that purpose, had it been contemplated or intended? Is it not an established principle in the law of nations "that the state in which things are found at the moment of the treaty shall be considered as lawful, and that if it is meant to make any change in it, the treaty must expressly mention it, and that, consequently, all things about which the treaty is silent remain as they were found at its conclusion? (*Vat. b. 4. § 21.*) And does not the sound sense of this rule equally extend to

cases where terms are used, which, to say the least, are equivocal, and may be otherwise amply satisfied? If, in several of our treaties of amity and commerce with *friendly European* powers, the several states are called on, by the most *particular* and express stipulations, to waive their laws of alienage, in favour of the subjects of such powers, does it readily follow, that, in a *treaty of peace*, with an *enemy-nation*, an expression entirely congenial with the character of such treaty, and which can be otherwise abundantly satisfied, shall have this most important effect? Nay, even if in the treaty of *amity and commerce* formed by us with the same power (*Great Britain*) in 1794, some *partial* privileges on this subject could only be obtained for *British* subjects, and those conferred by the most *explicit and unequivocal* terms; if even these privileges, notwithstanding the lapse of eleven years since the date of the treaty of peace, created a general ferment in our country, arising from ancient recollections; shall we construe the *general* words of the treaty before us to have an equal or more extensive effect?

The term "confiscation," then, when occurring in a treaty of peace, and especially in such a treaty formed by the limited government of the confederation, naturally means, *ex vi termini*, a confiscation *jure belli*, and nothing further. If I am right in this idea, it was unnecessary in the 6th article of the treaty, before stated, to annex other and tautologous words to make this more plain, to confine its signification to forfeitures on account of the part taken in the war. Such was already its meaning, and additional words would have been entirely superfluous: and this is an answer to the objection arising from the annexation of such words to the prosecutions mentioned in the same article, of which more hereafter. I hold it also to be of great weight in favour of my construction in this particular, that the confiscations here prohibited have this character more clearly designated, by being interdicted in the same article and sentence of that article with prosecutions on account of the *part taken in the war*.

If I am right in the above idea, as to the natural and general signification of the term "confiscation" when occurring in treaties of peace, that construction gains additional weight, in relation to the treaty before us, by the further consideration that there were, in fact, many such confiscations made by the several state governments during the revolutionary war. Perhaps I shall be warranted in saying, that there were in fact such confiscations made by every state in the union. (g) Some of those confiscations were made by the very bills of rights, or constitutions of the several states, but in general by legislative acts. Of the former class, it may be seen that the 25th article of the bill of rights of *North Carolina* seems to confiscate the proprietary rights to lands within the limits of that state. The legislative acts were of various descriptions, as acts of attainder, of seizure, and confiscation, &c. as may be seen at large in the documents attached to the letter just referred to.

The *Virginia* act upon this subject, after reciting that by the *Declaration of Independence* by the *United States*, the residuary subjects of the *British* empire became enemies and aliens to the said state, enacts, that all the property lying in the commonwealth belonging at that time to any *British* subject, &c. shall be deemed to be vested in the commonwealth; and a subsequent clause describes who shall be deemed *British* subjects, within the meaning of the act. (h) The passage of this act, *ipso facto*, confiscated the property therein contemplated; and the only inquiry necessary to be made, or which in fact was made (i) under this act, as it respected the proprietor of the land, was whether he were a *British* subject or not within the meaning of the act: there was no inquiry whether he was by law an alien. This act was emphatically an extraordinary act of confiscation. It was in addition to and not in exclusion of the ordinary municipal law of escheat and forfeiture on account of alienage. It only reached *British* property then actually holden, whereas the general law extended also to lands afterwards acquired by *British* aliens.

(g) See Hammond's letter to Jefferson. (h) Oct. 1779. ch. 14. (i) See inquiries in the office of the General Court.

This act confiscated the *property* of *all British* subjects: whereas the general law only reached the real property of those who were aliens. It may not universally hold that *all British* subjects were then aliens; and if the ideas of the plaintiff's counsel were correct, the general law would not reach lands acquired here by *British antenati*. These are prominent marks of distinction between the two laws; and this partial exercise of the extraordinary right of confiscation certainly did not supersede or interfere with the general law farther than that act has expressly gone.

Some stress has been laid upon the act of *October 1784*, c. 53., respecting future confiscations. It is not proper for me to avail myself of a knowledge acquired in another place, that it was decidedly the intention of the then legislature to avoid construing the treaty. There were various opinions then existing as to its true construction, and the prejudices and animosities of the day were not inconsiderable. Hence the act eventuated in using the very words of the treaty itself, and that merely by way of yielding the sanction of this state to that instrument as it really existed. That act meant not to take any *new* or extended ground whatsoever; and the proviso contained therein, inhibiting suits commenced posterior to the ratification of the treaty, can only extend to suits grounded on *such* confiscations as were intended by the treaty and the act to be prohibited.

Before I come to a particular examination of the 6th article of the treaty, I will take a short view of the 5th. The character of the confiscations interdicted by the 6th article, will be elucidated by considering what kind of confiscations are contemplated in the 5th. That article is in the following words:

“It is agreed that the congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real *British* subjects, and also of the estates, rights and properties of persons resident in districts in the possession of his majesty's arms, and who have

not borne arms against the said *United States*. And that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen *United States*, and therein to remain twelve months, unmolested in their endeavours to obtain the restitution of such of their estates, rights and properties, as may have been confiscated; and that congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation, which on the return of the blessings of peace should universally prevail. And that congress shall also earnestly recommend to the several states, that the estates, rights and properties of such lastmentioned persons shall be restored to them, they refunding to any persons who may be now in possession, the *bona fide* price (where any has been given) which such persons may have paid on purchasing any of the said lands, rights or properties, since the confiscation. And it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

This article upon a general view relates only to legislative acts of confiscation. It relates materially to the refugees, who, not being aliens, were already safe from the operation of the laws of alienage. It relates also, it is true, to confiscations made of the property of real *British* subjects: but as it purports to provide for the "*restitution* of their estates, rights and properties," it cannot mean to extend to cases of purchases of lands by, or descents to, *British aliens*, posterior to our separation, nor to the common law proceedings adapted to such cases. In such cases, such aliens have not any *estate*, *right*, or *property* in such lands, nor would they be *restored thereto*: if the treaty arrests such proceedings, it would not *restore* but *create* and *enlarge* the estates of such aliens. Cases of this kind and the ordinary proceedings of forfeiture founded thereon were not therefore contemplated in this article. With respect to the su-

perior claims of those who held land here, at the era of our separation, I am not prepared, at present, to say, whether the ordinary proceedings of escheat and forfeiture could ever have divested them. Meaning to touch this topic slightly hereafter, I will only at present say, that if not, then (as no necessity exists for it) such proceedings shall not be construed to be comprehended in the *confiscations* mentioned in this article: nor will the case be otherwise, admitting the law to be different; if, as I believe, no forfeitures of this class had in fact taken place in *America*, prior to the date of the treaty, and such therefore could not have been the ground of any stipulation in it. During the existence of the war, the ordinary law of escheat and forfeiture had not been put in force against *British* subjects. It had yielded to the more powerful and direct course of legislative confiscation, which was deemed preferable and was universally pursued. I am authorised to assume this as an indubitable fact; because Mr. *Hammond* (see his letter, p. 10. of the correspondence) after ransacking all our laws and judicial decisions from the beginning of the war to the time of his writing, has only stated one case (that of *Harrison's* representatives) in which a decision on this point has been given. That case will be set out presently, from the documents attached to the beforementioned correspondence; from which it will appear, that it was neither rendered by the supreme court of the state (*Maryland*) in which it was decided, nor rendered until the year 1790. When the devise in question in that case *accrued* is not stated. Am I not therefore correct in saying that no instances of the enforcement of the ordinary laws of alienage had taken place in relation to *British* subjects prior to the treaty of peace, and that therefore in providing for the restitution contemplated in the 5th article, it was wholly unnecessary to meet such cases. Courts, in making their constructions upon laws or treaties, may take notice of general and notorious facts affecting such construction. The *English* courts, for example, have in many instances taken notice of the general delusion created by the *South Sea* bubble in that country in the beginning of the last century. (See 1 *P. Wms. Reports*, 746.) So, as in the present in

stance, the long and laborious researches of the *British* minister before noticed, have produced no instance of the enforcement of the laws of alienage against *British* subjects, prior to the conclusion of the treaty; wherefore, shall *we* give to that instrument a construction opposed by so many objections, and only (at most) necessary if such decisions had actually existed? It is also not unworthy of observation, that congress are called upon by this article to recommend to the several states a "*reconsideration and revision* of all acts and laws regarding the premises:" thereby meaning such special and particular acts as may have been passed by them on the subject; but are not enjoined to recommend an exemption in favour of *British* subjects of such disabilities as accrued, not by virtue of particular legislative acts, but by the conjoined effect of the revolution and the common law relating to alienage antecedently existing in *America*.

If then the 5th article of the treaty only relates to *legislative* confiscations, let us inquire whether the 6th article is to be understood in a more extensive point of view; bearing in mind the general principle, that the *same* word occurring in different parts of an instrument shall *generally* be understood in the *same* sense. That article is as follows:

"That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in *America*, shall be immediately set at liberty, and the prosecutions so commenced be discontinued."

This article, upon the whole context of it taken together, can only relate to those, who, being *American* citizens, afterwards became refugees and joined the enemy. It cannot relate, in a collective point of view, to real *British* subjects. Keeping out of view for the present, that member of the article which prohibits future confiscations, and which requires a

more particular examination, would it not be absurd to stipulate that, after peace had taken place between the two nations we should commence no prosecutions against *real British subjects* for the part they had taken in the war? That part was not, in them, a culpable part: it was one which their duty and allegiance as subjects required them to take. Not residing in this country, nor being oppressed as the *Americans* were, it was not their business to join in our revolt, nor to take a part in our battles. If there had been no such article in the treaty, and *America* had thereafter commenced such prosecutions against such *British* subjects, *Great Britain* would have justly considered them as acts of hostility against her. This provision then, as relative to *real British* subjects, is wholly superfluous and unnecessary: it shall not therefore be considered to have relation to them. But with respect to the *American* refugees, this stipulation was strictly necessary and proper. They had become citizens of the *American* states; and, without expatriating themselves, had joined the standard of the enemy. After the peace, the several states might justly have called these their offending citizens to a severe account for their conduct: but the humanity and honour of the *British* nation was deeply interested to protect them; to protect these *American* traitors from the vengeance of their own governments. The latter part of this article therefore applies exclusively to them, however it may be with the former. The interdiction of prosecutions for the part they had taken in the war, and of loss or damage accruing therefrom, as it related only to them, so it effectually secured them from such common law forfeitures as were incident to attainders or prosecutions for treason. As to confiscations in relation to these persons, as they were not legally aliens in the several states, they were already sufficiently safe from the effects of the laws of alienage. The inhibition then of *legislative* confiscations, conjoined with the interdiction of prosecutions on account of the part taken in the war, would entirely secure and protect the refugees. Wherefore then give the treaty a construction which intrenches upon the municipal rights of the several states, when every necessary end, in respect of the refugees,

be pretended in this commonwealth, after the strong legislative declarations on the subject contained in the before-mentioned act of 1779,) suppose that many instances took place of devises being made, or descents permitted, to those who, in the double character of enemies and aliens, were liable to the double penalties of legislative confiscation and municipal forfeitures on account of alienage. The permission of such vain and fruitless devises and descents would argue great weakness on the part of our people; and we may therefore fairly conclude that cases of this class occurring during the war were probably few, and those, as I have already said, possessed no strong claim on the *British* king to stipulate in their favour. Besides, no construction can be made, in the present instance, in favour of *heirs* or *devisees*, which will not equally operate in favour of actual *purchasers* of land here, (in the ordinary sense) who with their eyes open have violated the laws and contravened the policy of their sovereign! If a plaintiff of this description were now before the court, would the construction of the treaty be *extended* in *his* favour? Certainly not. But the construction must be uniform, and it is a sound rule that in making a construction all the consequences are to be taken into consideration. I repeat therefore that the cases of any of these classes were probably but few; that none of them had any strong claim upon the *British* king to stipulate in their favour; and that the actors in *some* of them actually contravened his policy and injunctions. These cases were therefore probably not contemplated nor considered in forming the treaty, or, if so contemplated, were abandoned on account of the weakness of their pretensions.

But further; *British* subjects claiming on any of the three grounds of *descent*, *devise*, or *actual purchase*, held not *actual interests*, with reference to the epoch of our independence, but mere *possibilities* of interest, (even admitting the question of alienage to be in their favour); interests emphatically in *nubibus*; interests often assailed by the acts of our legislature and reprobated by the decisions of our courts. As well might the eldest sons of our own citizens complain of the destruction of the right of primogeniture, living their fathers, as these

British subjects object that, long antecedent to the accruing of their claims, they were thrown into the class of aliens by the natural and necessary effect of our preexisting general municipal regulations. It was too much for the *British* king to ask, were he even impelled by a strong motive, or for our government to grant, that the rights of escheat and forfeiture accruing *during the war* should be surrendered in relation to *British* subjects. Such a relinquishment in itself would not perhaps have been very important, had congress possessed adequate powers; but it might have carried with it the appearance of a concession to which *America* would have been extremely averse, namely, that the doctrines of alienage did not attach here till the signature of the treaty, or, in other words, that we were not until then an independent nation! With respect to such acquisitions here, after the *date of the treaty* (as in the case before us) they stand upon a still weaker ground. It would have been most unreasonable for the *British* king to ask, or for us to grant, in favour of *mere future* and *possible* interests, that his subjects should be in some sense the same people with us after we had established ourselves to be wholly independent of that nation, and that they should, without rendering us any services or owing us any allegiance, be entitled, through *all time*, to important privileges in our country, which only the subjects of one or two of the most friendly and favoured nations were at that time permitted to enjoy. I will close this part of the subject by one general observation, and that is, that in all those of our treaties in which it was intended to yield up the laws of alienage in favour of the subjects of highly friendly and favoured nations, nay, even in the instrument of confederation itself, in relation to the citizens of the other states of the union, (see art. 4.) express, explicit, and appropriate terms are used to effect such surrender: whereas, this is an attempt under *general* and ambiguous expressions (to admit the most), to infer a surrender of those laws and to create or enlarge interests in favour of the subjects of a nation then certainly standing at the head of those the least favoured by *America*, and which has not been able to obtain from us, up

to this day, even by the famous treaty of 1794, the boon in question in the extent now contended for! I have avoided as much as possible in this whole discussion having reference to that treaty (the treaty of 1794). I must here however repeat my remarks, that that treaty has not left vested and existing rights to rest upon the same basis with future, contingent and possible ones; and that while that treaty has established in a remarkable manner the property in lands *then* actually *holden* in either country, it has suffered these future and possible rights together with this famous doctrine of legitimation, to perish in the quicksands of the revolution; to be cast into the fathomless vortex prepared by that revolution for all those parts and principles of the common law of *England*, which are *heterogeneous* to our republican institutions! If it be argued that that treaty protects and *enlarges* the null and defeasible interests acquired here by *British* subjects up to the time of its formation, it proves nothing in relation to the treaty of 1783; not only because the *present* general government of the *United States* has, perhaps, powers competent to that purpose, but has in fact used strong and apt words to effect it: in both which important respects the treaty of 1783 is widely different.

As the 6th article of the treaty only *recommends* to the several states to do what congress had no power to do absolutely, *i. e.* to refund money produced by confiscations; and if congress, as I contend, had no greater right to arrest property vested in the several states by their laws of alienage than to demand the money contemplated by the 5th article, if such arrestation had been contemplated by the 6th article, would not the style of *recommendation* have been also kept up therein? and as there is a *positive* interdict of "confiscations" stipulated by that article, shall we not infer from this change of style, that it relates merely to such confiscations as congress possessed an absolute right to prohibit? It may not be improper to add that another part of the terms of the clause in question seems to favour the construction I contend for. Those terms are, "that there shall be no future confiscations made." This term "*made*" seems strongly to import an ac-

tive measure to effect a forfeiture, such as a legislative act, and not that kind of confiscation, which is produced by the ordinary and passive operation of the laws of escheat and forfeiture.

I have so far considered this case as if it were a *case of forfeiture*; whereas it is a right accruing to the commonwealth by way of "*escheat*." Every thing that I have now said to discriminate between forfeiture and confiscation holds more strongly in relation to a right accruing by *escheat*. It is doing much more violence to the meaning of the latter term than the former, to make it synonymous with *confiscation*. I have also viewed it in general, as if the descent in question had fallen prior to the date of the treaty of peace; whereas it was cast long after. Ours therefore is a much stronger case than that; for, with respect to antecedent descents and purchases, there was some ground or semblance of ground for the treaty to operate upon. But in this case, as the *antenati*-pretension is entirely exploded, the present plaintiffs cannot recover unless we are prepared to say, that (bating the treaty of 1794) *through all time* all *British* subjects, in cases like the present, are entitled to recover.

The 4th inquiry I proposed to make under the head of the treaty is in a great measure anticipated. I mean with respect to the capacity of *British* subjects to sustain real actions. This right is I think incidental to the right to the subject. In all cases in which lands are preserved to *British* subjects, (for example, under the treaty of 1794) their right to sue for them is also preserved; and this right forms in that case an exception to the general doctrine of alienage: but, on the other hand, where the *principal* does not exist, neither does the *incident*; they stand and fall together. While therefore I can never subscribe to the position, I had almost said the absurd position, taken by the plaintiff, that all those are entitled to sue for lands here who were so entitled at the time of their birth under another government of which they were then members, I can readily admit those to sue, (in derogation from the general principle attaching a disability to aliens in this respect)

to whom our laws or treaties have yielded a right to the subject sued for.

I have thus given to the treaty of peace a construction which outstrips and goes beyond the actual case before us. I have done this, not only because all the aspects of the case seem much involved with each other, but also for the reasons before assigned, for discussing somewhat at large the pretensions of the *antenati*. My observations are so multifarious and desultory, that I fear I shall not be fully understood; but I have not time to reduce them to order nor even to recapitulate.

The construction of the treaty which I now contend for has been impeached, loudly impeached, as gaining nothing for the other contracting party, by merely inhibiting *legislative confiscations*, while it leaves free the ordinary laws of alienage. To this objection I would answer; 1st, That that construction fully satisfies the words of the treaty, and goes the full length of the actual powers of the government of the confederation on the subject; 2dly, That it secures *every thing* for the *refugees*, whose interests were anxiously attended to by the *British* government in the formation of the treaty; 3dly, That it secures *money and personal property*, to whomsoever belonging, there being no ordinary laws in any of the states to work a forfeiture of it; and 4thly, that if the ordinary laws of alienage cannot divest *lands* actually holden here by *British* subjects at the time of our separation (on which however I give no opinion), my construction of the treaty abandons no claims of *British* subjects to lands in this country, but *eventual, contingent and unlawful* ones; unlawful, as being acquired at a time when they were equally interdicted by the laws and by the actual state of things between the two countries: and that if our ordinary laws can divest such lands, (lands holden here in 1776) it is meet that the *British* subjects should lose *something* by the war, when the *Americans* lost *every thing*. While we argue from what was incumbent upon the *British* king to do on behalf of his people, we ought not to lose sight of a construction which respects the rights of the sovereign states of *America*, and the actual temper and situation of the time: we ought not to stickle for *liberalities*

in favour of *British* subjects, when such were not the order of the day, and have not in fact been dealt out to us by *them*. It ought not however to be lost sight of, as abridging the extent of this evil, (if it be one, and is not otherwise cured,) that in several of the states (*Pennsylvania*, I am informed, for example) no laws imposing forfeitures on account of alienage do exist, and that, therefore, as to those states every possible end to be desired in favour of *British* subjects will be attained, by confining the *confiscations* intended by the 6th article of the treaty to signify legislative confiscations merely.

I cannot dismiss this very important subject without declaring my satisfaction to find the result of my inquiries entirely corroborated by a great authority. A production truly worthy of the pen of the author of the declaration of independence; a production which must ever rank high among the most distinguished of diplomatic dissertations; which bears the most evident marks of the most patient and laborious investigation; an essay which confounded the *British* minister and put him to silence, cannot but be considered by me as a great authority. *Americans* can never be indifferent to a work written by *Jefferson* and sanctioned by *Washington*. I will even bring this work into a court of justice infinitely sooner than the *obiter dicta* of judges, pronounced without necessity, and founded on no deliberation. There is no magic in the name or character of *judges* which will induce me to *repel* the ablest opinions of the greatest men on the most important subjects. Truth and right are my objects, and I will avail myself of all practicable means to endeavour to attain them.

Mr. *Hammond*, the *British* minister in this country, had made complaints on the very *subject* now before us, that is, the subject of infractions of the treaty of peace, and had invited the then secretary of state (Mr. *Jefferson*) to a discussion. He had complained, *inter alia*, of a decision in the state of *Maryland* on the subject of alienage in the case of *Harrison's* representatives. He had complained of this decision; but although he was conjuring up all the infractions of the treaty which the wit of man could invent or suggest, he did not urge *it* as an infraction of the 6th article, nor even,

in itself, of *any* article of that treaty. He did not urge this decision or any other decision, as an infraction of that article interdicting "future confiscations," although he would have undoubtedly done so had he concurred with the plaintiffs' counsel in the construction they now contend for. He has come into my construction of the treaty in this instance by confining his list of the infractions of the 6th article to *legislative* violations only: (see his letter, p. 15.) He merely complained of the decision in *Harrison's* case, as establishing a principle which, taken in connexion with the laws of some of the states compelling creditors to receive *lands* in payment of their debts, infringed the *fourth* article of the treaty guaranteeing the *bona fide* payment of the *British* debts. He complained that the fourth article of the treaty was infringed or eluded by compelling *British* subjects to receive *land* in payment, while the decisions of the laws of alienage did not permit them to hold such lands. (p. 12.)

This then seems to be the extent of his complaint on this head. Be that matter, however, as it may, the secretary of state obtained from the senators and delegates of the state of *Maryland* in congress the following statement in relation to that case of *Harrison's* representatives, viz. "On the disclosure of facts made by the trustees of the will of *Harrison* upon oath, in chancery, in consequence of the claim made by the attorney-general in behalf of the state, the chancery court determined it in behalf of the state it is believed on this principle, that however *Great Britain* might consider the *antenati* as subjects born, and that they could not divest themselves of inheritable qualities, yet that the principle did not reciprocate on *America*, as those *antenati* of *Great Britain* could never be considered as subjects born of *Maryland*. The legislature however took the matter up and passed an act relinquishing any right of the state, and directing the intention of the testator to take effect, notwithstanding such right. It is conceived that this was a liberal and voluntary act on the part of the legislature in behalf of *Harrison's* representatives, who are at liberty to pursue their claim."⁽¹⁾

(1) Documents, p. 96.

Mr. *Jefferson* (the secretary) taking up this case upon the above report observes, "The case of *Harrison's* representatives in the court of chancery of *Maryland*, is in the list of infractions. These representatives being *British* subjects, and the laws of this country, like those of *England*, not permitting aliens to hold lands, the question was, whether *British* subjects were aliens. They declared that they were, consequently that they could not take lands, and consequently also that the lands in this case escheated to the state: thereupon the legislature immediately interposed and passed a special act allowing the benefits of succession to the representatives. But had they not relieved them, *the case* WOULD NOT HAVE COME UNDER THE TREATY, as there is no stipulation in that *doing away the laws of alienage* and enabling the members of each nation to inherit or hold lands in the other.(*m*)

I conclude, as the best result of my judgment, that the law of this case is in favour of the defendant, and that the judgment of the district court should be affirmed.

Judgment affirmed.

(*m*) *Jefferson's Letter*, p. 36.

The Attachment Laws of Maryland.

NO person can avail himself of the process of attachment in this state, but a citizen of some one of the *United States*, and his citizenship must be set forth in the oath of the debt which he makes before the attachment is issued. Those who are liable to be sued in this manner, are persons not citizens of this state, and not residing therein; and citizens who shall actually run away, abscond, or fly from justice, or those who secretly remove themselves from their place of abode with intent to evade the payment of their just debts.

The plaintiff, in the first instance, applies to a justice of the peace of this state, or to any judge of any other of the *United States* before whom he must make the following oath:

State of *Maryland* [or *Pennsylvania*] sc.

Be it remembered, that on this — day of — in the year of our Lord —, before me [here insert the name and style of the judge or justice] personally appeared *A. B.* a citizen of the state of —, who being duly sworn, did depose and say, that *C. D.* is *bonâ fide* indebted to him in the sum of — over and above all discounts, and the said *A. B.* at the same time produced the *promissory note*, by which the said *C. D.* is so indebted, and which said promissory note is hereunto annexed. And the said *A. B.* further made oath that he *doth know* [or, is credibly informed and verily believes] that the said *C. D.* is not a citizen of the state of *Maryland*, and doth not reside therein. [Or, hath actually run away, or secretly removed himself, from his place of abode, with intent to evade the payment of his just debts.]

The courts require the words of the act to be followed strictly, in the oath of the debt. The original instrument or open account upon which the debt arises must be exhibited to the person administering the oath, and annexed to it.

The oath or affirmation if made before a judge in any other state is not admitted as evidence unless there be annexed to it a certificate of the clerk of the court of which he is judge, or certificate of the governor, chief magistrate or notary public of such state, that the said judge hath authority to administer such oath or affirmation.

Bills of Exchange in the territory of Orleans.

ON bills drawn within the territory upon persons residing without the limits of the *United States* and returned, the damages are twenty per cent.; but if the drawee reside within those limits, the damages are ten per cent.

Judicial Establishment in the Territory of Orleans.

THIS territory is divided into districts, counties, and parishes. The division into counties was originally made, as in the *United States*, for judicial purposes, and county courts were established there on the model of our own, but the system has been lately changed in that respect, and the only remains of a judicial county establishment is a *sheriff*, which is still appointed in every county and commissioned by the governor during his pleasure.

There is a superior court appointed by the president of the *United States*, consisting of three judges commissioned for four years, which has original jurisdiction in all matters civil and criminal, provided, in civil cases the demand exceeds fifty dollars. That court sits in *New Orleans*, and holds its sessions once in every month, and one of its judges holds a circuit court from time to time in each of the five districts into which the territory is divided.

In every parish, there is a judge appointed and commissioned by the governor for four years, and removeable only on the application of two thirds of the legislature. The powers of this magistrate are most extensive. He has original jurisdiction of civil causes to any amount, subject to an appeal to the superior or circuit court. He is judge and register of probate, coroner and treasurer within his district. He is also a notary public, makes all inventories, appraisements and judicial sales, except those that are made by virtue of process from the superior court. He is inspector of highways, makes regulations for the due preservation of the dykes and levees, and punishes the infractors thereof. He has moreover all the powers of a justice of the peace in criminal cases.

There is also in each parish a competent number of justices of the peace, whose powers are the same with those of justices of the peace in the *United States*, and who have cognisance of small debts under fifty dollars.

The territory is governed in civil cases by a written code of laws, which is almost entirely copied from the *Napoleon* code. The form of judicial proceedings is prescribed by several acts of the territorial legislature.

The mode of proceeding is by petition to the court, stating the names of the parties, the nature of the complaint and the species of relief prayed for. A copy of this petition and a citation is then served upon the defendant, and if the party fail to appear on the day appointed, and file his answer, or obtain further time, judgment is rendered against him. If a fact is disputed, a jury is summoned, and their verdict is conclusive as to that fact.

When a petition is presented for the recovery of a debt due from a person, being about permanently to depart from the territory, before, in the common course of proceeding, judgment could be rendered and execution issue against him; or for the recovery of a debt due from a person residing out of the territory, or departed therefrom, or who conceals himself with intent to evade the payment of his debts, and such intent to depart, actual departure, residence abroad, or concealment, together with the existence of the debt, shall be proved

to the satisfaction of the judge, he directs the clerk to issue an attachment against the goods and chattels, lands and tenements, &c. Upon the return of the writ, the court proceeds to hear and determine the claim, first naming a defendant for the debtor, if he be absent, or do not name an attorney; but in all cases, the court may grant such delay in favour of an absent debtor as may seem just. The attachment may be superseded by proving that the facts upon which the writ issued were not truly stated, or by giving bail to the satisfaction of the sheriff. But if the petitioner satisfy the court of the truth of his facts, and further swear, that so far as he knows or believes, the defendant does not possess sufficient property within the territory, to satisfy the judgment which he expects to obtain, and that the said oath is not made for the purpose of vexing and harassing the defendant, but in order to secure the petitioner's demand, the court may require from the defendant sufficient security for his appearance. If the condition of his bond be broken, judgment may be obtained against the bail, on motion, by giving him ten days' notice. The defendant so arrested, may be discharged by proving that the facts are not true, or by placing in the hands of the sheriff property to the amount of the debt.

All real property and slaves of the defendant are bound from the date of the judgment for one year thereafter. Personal property is bound from the time of the delivery of the *fieri facias* to the sheriff, and for three months thereafter.

Either party may require the other to answer written interrogatories upon oath, and if he neglect to do so, they are taken *pro confesso*.

Appeals are prosecuted in the usual manner; but there is no appeal where the sum does not exceed 100 dols. When a judgment is rendered for the performance of any specified act, other than the payment of money, if the party neglect or refuse to perform it, a writ of *distringas* issues to the sheriff, by virtue of which all the real and personal estate of the party is taken into possession, and the rents, issues, and profits are subject to the order of the court until the *distringas* is superseded.

It is superseded by the performance of the act required. When witnesses are too aged or infirm to be produced at the trial, or reside out of the *county* in which the trial is to be had, or are about to leave the *county*, they may be examined before any parish judge, judge of the superior court, or mayor of the city of *New Orleans*, who have power to compel their appearance. Notice of the examination is to be given to the opposite party. In cases where long accounts are to be examined, the court may appoint three referees to report upon them the balance due, and this report is conclusive as to the state of the accounts.

The justices of the peace have jurisdiction, without appeal, in all civil cases under 50 dollars.

All women, ministers of religion, duly appointed, and all persons of the age of sixty years and upwards, and all other persons whose state of health may be such as that they cannot, without danger to their lives, be imprisoned, are exempted from imprisonment for debt, whether on meane process or in execution.

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The manner of authenticating foreign deeds, records and other instruments in writing, in order to entitle them to be admitted in evidence in Virginia.

December 8, 1792.

WHEREAS, the intercourse between this state and other states in the union, and between this state and foreign nations, has become more considerable than heretofore, which renders it necessary that some mode should be adopted to give authenticity to deeds and certain other instruments in writing, foreign judgments, specialties on records, registers of births and marriages, made, executed, entered into, given, and enregistered, by and between persons residing in any of the *United States*, or in any foreign kingdom, state, nation, or colony beyond sea, and out of the jurisdiction of this state,

Be it enacted, &c. That all such deeds, if acknowledged by the party, or proved by the number of witnesses requisite before any court of law, or the mayor, or other chief magistrate of any city, town, or corporation of the county in which the party shall dwell, certified by such court, or, &c. in the manner such acts are usually authenticated by them; and all policies of insurance, charter-parties, powers of attorney, foreign judgments, specialties on record, registers of births and marriages, as have been, or shall be made, executed, entered into, given and enregistered, in due form, according to the laws of such state, kingdom, nation, province, island, or colony, and attested by a notary public, with a testimonial from the proper officer of the city, county, corporation, or borough, where such notary public shall reside, or the great seal of such state, kingdom, province, island, colony, or place, beyond sea, shall be evidence in all the courts of record within this commonwealth, as if the same had been proved in the said courts.

All and every act, &c. within the purview of this act, are hereby repealed. Provided always, that nothing in this act contained shall be construed in any manner to alter the method of taking and certifying the privy examination of any *feme covert*, or in any other respect to alter and repeal the act entitled, "An act for regulating conveyances."

(REVISED CODE.)

An act for Regulating Conveyances.

Passed December 13, 1792.

Sect. 1. **N**O estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the

writing be acknowledged by the party who shall have sealed and delivered it, or be proved by three witnesses to be his act, before the general court, or the court of that district, county, city, or corporation in which the land conveyed, or some part thereof lieth, or in the manner hereinafter directed, within eight months after the time of ensealing and delivery, and be lodged with the clerk of such court to be there recorded.

Sect. 5. If the party who shall sign and seal any such writing reside not in *Virginia*, or in the district or county where the lands conveyed lie, the acknowledgment by such party, or the proof by the number of witnesses requisite, of the sealing and delivering of the writing, before any court of law, or the mayor, or other chief magistrate of any city, town, or corporation of the county, in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded, within eighteen months after the sealing and delivery, where the party resides out of this commonwealth, and within eight months after the sealing and delivery, where the party resides within this commonwealth, shall be as effectual as if it had been in the lastmentioned court.

Sect. 6. When husband and wife have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily, and apart from her husband by one of the judges, shall declare to him, that she did freely and willingly seal and deliver the said writing to be then shewn and explained to her, and wishes not to retract it, and shall, before the court, acknowledge the writing, again shewn to her, to be her act, or if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the *United States of America*, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily, and take the acknowledgment, the wife being examined privily, and apart from her husband, by those commissioners, shall declare, that she willingly signed and sealed

the said writing, to be then shewn and explained to her by them, and consenteth that it may be recorded, and the said commissioners shall return with the commission, and thereunto annexed, a certificate under their hands and seals of such privy examination by them, and of such declaration made and consent yielded by her, in either case, the said writing acknowledged also by the husband, or proved by witnesses to be his act, and recorded together with such her privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed, or released, but be as effectual for every other purpose as if she were an unmarried woman.

Of the Registry of Lands in Virginia.

Passed February 5, 1810.

IN order to prevent the holders of lands in *Virginia* from eluding the payment of taxes, the legislature of that state lately passed a law declaring, that all lands which were not entered on the commissioners' books of that county, in which the tract lies, within eighteen months from the 5th of *February*, 1810, should be forfeited to the commonwealth. There is the usual proviso in favour of the rights of infants, *femes covert*, and persons of insane memory.

REVIEW.

Discussions du Code Civil dans le Conseil d'Etat, &c. i. e. Discussions respecting the Civil Code, in the Council of State, preceded by the corresponding articles of the text and the *projet*; with notes, principally relating to the observations and the jurisprudence of the Courts of Reversal and Appeal. On the *plan* of *M. Regnaud*, (of *St. Jean d'Angely*) counsellor of state, &c. &c. By *M. M. Jouanneau* and *L. C. De Solon*. Quarto, 2 vols. Paris.

[Continued from vol. 2, p. 483.]

ON opening the second volume of this interesting work, our attention was immediately attracted by a discussion on the *law of inheritance and successions*. As this is a subject which forms one of the most important branches of civil legislation, and, in a particular manner, “comes home to men’s business and bosoms,” we shall enter into some discussion of this article.

Mr. *Gibbon* (vol. 4. chap. 4.) introduces his exposition of the law of *Justinian* on this point, by observing “that the personal title of a first proprietor must be determined by his death: but the possession without any appearance of change, is peaceably continued in his children, the associates of his toil, and the partners of his wealth. This natural inheritance is protected by the legislatures of every climate and age; and the father is encouraged to persevere in slow and distant improvements by the tender hope, that a long posterity will enjoy the fruits of his labour. The principle of hereditary succession is universal; but the order has been variously established, by convenience or caprice, by the spirit of national institutions, or by some partial example, which was originally decided by fraud or violence.”

Among the *Jews*, the sons succeeded to the father's landed property, in exclusion of the daughters; so that the only fund for the provision of the daughters was the father's personal estate. The father might dispose of that part of his possessions to whom he pleased; and if he made no disposition of it, his children were entitled to it, in equal shares. If he left no son, his landed property descended to his daughters; and, if he had more than one daughter, it was divided equally among them. If he left neither son nor daughter, his father inherited; if he left no father, his brothers succeeded; and if he left no brother, the succession devolved to his sisters: but on all occasions the descendants represented their ancestors, and were called to the succession before their collaterals. The eldest son was invested with peculiar privileges; he had a right to a double portion of the estate, to the priesthood, and to the principal authority, or, as the Rabbins express it, to the kingdom among his brethren. The husband succeeded to the wife, but the wife did not succeed to the husband. If the husband had children by different wives, each of whom brought him landed property, the children of each mother were primarily entitled to her succession; and, on failure of those, the children of the other mother were called to it. On a general failure of heirs in descending, ascending and collateral lines, the land devolved to the state.

At *Athens*, females were entirely excluded from the succession. By the original jurisprudence of *Rome*, males and females participated equally in the inheritance; the *Voconian* law excluded females: but its provisions were gradually superseded by the riches and manners of the republic, first in favour of daughters, and afterwards in favour of such female collaterals as were nearly related to the intestate. The law of *Justinian* admitted males and females equally to the succession, and an unqualified right of representation attended every line of the inheritance.

The feudal policy introduced a succession wholly unknown to any former system of jurisprudence. Under the successive appellations of *munera*, *beneficia*, and *feuda*, fiefs were held,

first, at the will of the donor; then during the life of the feudatory; then, by the feudatory and his lineal heirs; and finally his collateral heirs were admitted into the inheritance. In most countries on the continent, the ascending is called to the inheritance before the collateral line: but, in *England*, the parent was never allowed to succeed to the child. In countries governed by the feudal law, the preference of males to females is very common; and generally, females are received into the tenure in default of males: but the distinctive mark of feudal succession is the splendid prerogative assigned by it to primogeniture. The policy of most feudal countries allows a portion of the inheritance to the younger sons: but the great bulk of it is the patrimony of the eldest son; he represents the fief, is entitled to all its honours and profits, and is liable to all its burthens.

Our *English* law of succession is still more favourable to the eldest son. Originally, the sons inherited equally.

A law of *Edward* the Confessor directs that, on the decease of an intestate, all his sons shall inherit his property. It is supposed that *William* the conqueror first established the right of primogeniture: but, so low as in the reign of *Henry* I. a law is found, which shews that, if the intestate had several fiefs, they were severally inherited by his sons, the eldest retaining the principal or first fief of his father. This is the last vestige of any favour shewn by our law to the younger males. As the law now stands, and has immemorially stood, their provision depends on the will of the parent. The feudal institutions of *France* were much more favourable to them. During the *Carlovingian* race, fiefs were divisible among all the sons: under the succeeding dynasty, traces of the prerogative of primogeniture are discoverable; in an early period of the *Capetian* dynasty, they became general; the final settlement of them was made by a constitution of *Philip Augustus* in 1210, which assigned the representation of the fief and the bulk of its possessions to the eldest son: but under the rights of *frerâge* and *apanâge*, some provision was made by it for the younger children.

By the *Code Napoleon*, children and their descendants succeed without any distinction of age or sex, or of whole blood or half blood, to their father and mother, grandfather and grandmother, and remote ancestors; and if the inheritance has descended to a child, it is immaterial, (except in respect to the consequences of half blood, which we shall afterwards notice) whether it descend to him from his father or his mother. The descendants inherit by the head, when they are in the same degree, and are called to the succession in their own right: but they succeed by the root, when they take by way of representation. If there be a total failure of lineal heirs, and the intestate survive both his parents, then his brothers and sisters, or the persons representing them in the descending line, are called to the succession, in exclusion of collaterals, and without limitation as to age or sex. If the intestate die without issue in the lifetime of both his parents, his brothers and sisters and their representatives in the descending line are entitled to one half of the succession, and the parents may claim the other half; if the intestate survive one only of his parents, his brothers and sisters have a right to three fourths of the succession; and the surviving parent has the other fourth, with the income during his or her life, of one third of the remaining three fourths. If the intestate leave no heir in the descending line, and neither brother nor sister nor representative of brother or sister, the succession is divided in moieties between the paternal and maternal line: but if the heir in the ascending line has made any gift of property to the intestate, the property so given, or its value if it has been sold, returns to the donor.

The succession, to which the brothers and sisters become entitled, is divisible among them, if they are all of the whole blood, in equal shares; if some of them are of the whole blood, and some of the half blood, the succession is divided into two lines, one for the paternal, the other for the maternal brothers or sisters of the intestate; the brother and sister of the whole blood share in each line, the paternal brothers in the paternal line only, and the maternal brothers and sisters in the maternal line only.

The ancient law of *Rome* allowed the parent an unlimited power of disposing of his property by will, so that he was at full liberty to disinherit his child; and this was part of the *patria potestas* which that law so liberally conferred: but it being found that parents often disinherited their children without cause, the law gave the children, who had been unjustly disinherited, an action of complaint against such will as inofficious, or in other words as wanting in moral duty, under colour that the parent was not of sound mind when he made his will. This supposed insanity was a mere fiction of law, to avoid the appearance of directly impugning the authority of the twelve tables, which explicitly gave all persons an absolute and uncontrolled power of devising their property as they might chuse. Parents were entitled to the same action for the inofficious wills of their children; and brothers and sisters for the inofficious wills of their brothers and sisters. The parent, however, was considered as having satisfied his duty, if he bequeathed to his children a fourth part of his property; and even if he bequeathed them any thing, the complaint of inofficiousness did not lie; but the prætor gave the children an action to have their portion completed. The portion being secured to them by law, was called the legitime. By the novells, *Justinian* increased it to one third, if there were not more than four children, and to one half, if they were more than four. In some parts of *England*, particularly in *London*, till the 4th and 5th of *William* and *Mary*, custom reserved a reasonable part of the deceased's personal estate for his widow and children, for which the law gave them the writ *de rationabili parte bonorum*. The present law of *Scotland* secures to children their legitime or bairn's part, which is one third, if the deceased leave a wife, and one half, if he leave none. In this respect, the customary law of *France* was different in different provinces: but, generally speaking, the provincial customs allowed a legitime, and proportioned it to the number of the children. The chief consul expresses his approbation of the *Roman* law. The legislature, he says, should always have in view the preservation of moderate fortunes, which he calls the strength of the state. Too much subdivision reduces them

to nothing, particularly if it occasion the sale of the mansion, which is the central point, and the alienation of which usually produces the extinction of the family. Agreeably to these suggestions, the *Napoleon Code* provides that a parent shall not by act *inter vivos*, nor by will, dispose of more than one half of his property, if he leave only one legitimate child; nor of more than one third, if he leave two or more legitimate children, the descendants of children representing them. If the deceased have no issue, but have heirs in the ascending line, both on the side of his father and the side of his mother, he may dispose of one half of his property; if he leave heirs in the ascending line, on one side only, he may dispose of three fourths; if he leave no heir in the ascending line, he may dispose of the whole of his property.

The *Napoleon Code* expresses that illegitimate children have no right to heirship, but makes some provision for them. If the parent leave lawful issue, the illegitimate child is entitled to one third of that portion of the inheritance which the law would have conferred on him, if he had been legitimate; if the parent have no lawful issue, the illegitimate child is entitled to one half of that portion: but the illegitimate child is excluded from this allotment, if the parent has provided for him or taught him a trade. If the illegitimate child die without issue, the parent, who has acknowledged him, inherits his property; if no such parent be living, the lawful children of such parent succeed to it.

Our readers are probably apprized of the multiplied modes by which, through the medium of substitutions and *fidei commissa* in the civil law, and by the operation of entails and redemptions in the feudal law, property has been inalienable. The code before us prohibits all substitutions, and every other restraint on alienation, with three exceptions; the emperor may declare the property hereditary; a parent may give the income of any part of his disposable property to any of his children for his life, with a limitation of the property itself to their children; and a person dying without issue may, in like manner, give a life interest to any of his brothers and sisters,

and may direct the substance of the property to vest, at their deaths, in their children.

These are the principal regulations in the present code respecting inheritance and successions. It is observable that it confines representation to the twelfth degree. Whether consanguinity should, in respect to succession and inheritance, be universally extended, was a great question both among the ancient and among the modern civilians; the former contended for limiting it within the tenth degree, and the latter for its universal protraction; the early canonists generally confined it to the seventh degree. In *England*, unlimited consanguinity is allowed in respect to the right of succession: but in some other legal rights, it is confined to the fourth degree. Thus, in writs brought to recover landed property by a person claiming in the character of cousin, no one can maintain this writ if his common ancestor be removed higher than the father of the great grandfather; that is, unless the common ancestor be within four degrees of the claimant. A good reason against unlimited consanguinity does not present itself to us; and we are at a loss to discover any ground for confining it to the twelfth degree. *Henry IV.* stood in the twenty-fourth degree of consanguinity to *Henry III.* his immediate predecessor.

One of the most interesting discussions in the code before us arises on the *nullity of sales for inadequacy of price*; or, to use the language here adopted from the *Roman law*, "the rescision of a sale on account of lesion." The *Roman law* considered the sale to be void, if the property was sold for less than one half of its worth: but the equity of this law was a subject of much dispute among the civilians. One of the greatest objections to it is, that the seller and the purchaser stand in the same predicament to each other, and are equally entitled to the justice and the favour of the law; and therefore, if inadequacy of price should authorise the seller to annul the contract, excess of price should equally authorise the purchaser to set it aside. The chief consul contends for the rescision of the contract. His strongest argument is, that the seller should be more favoured by law than the purchaser, because the seller is forced to the sale by his wants, and

his family is injured by it: but the purchaser is perfectly free, and has the whole profit of the contract. The advice of the chief consul prevails; and the code orders that, if the property be not sold for five twelfths of its value, the seller shall be entitled to an action for the rescision of the sale, though he has expressly renounced his right to this action in the contract of sale: but the action must be brought within two years after the contract; and the law extends only to the sale of real property, and to no sale by public auction.

In civil concerns, *imprisonment* is confined to some cases of gross fraud, and of gross breach of trust, which are particularly enumerated. In all cases of debt, the person of the debtor becomes free by his making over all his property to his creditors: but this does not extinguish the debt; so that the future acquisitions of the debtor are still liable to the demands of his creditors. We think that this legislative provision deserves the serious consideration of every country in which imprisonment for debt is allowed. It is obvious that this imprisonment inflicts wretchedness on the sufferers, deprives the public of their industry, and makes them a heavy and destructive weight on the state: while the *Napoleon Code* restores them to comfort, gives the public the benefit of their toil, and frees the state from the burthen. Surely, then, the addition of physical and mental strength, which a state acquires by the abolition of imprisonment for debt, must be very great; and this advantage should not, for want of reflection, be presented by us to *Bonaparte*.

Towards the close of the second volume, we have an interesting discussion on the registration of mortgages. By the *Roman* law, no publicity of a mortgage was necessary for its validity; and it should seem that the law of *France* required this publicity, as necessary for the legal validity of a mortgage.

In our opinion, the *Napoleon Code* does honour to the persons by whom it was compiled. The general arrangement of the work appears to be very good: the divisions and subdivisions seem to be produced by the subject; and the attention of the reader easily follows them. The style is unaffected, ner-

vous and clear, and is perfectly free from the metaphysical subtlety and pomp of phrase with which the *Institutes of Justinian* are truly reproached. It evidently was the object of the compilers to effect a simple system of legislation; and, so far as we are able to judge, they have attained their object. The *Discussions* are also creditable to the parties, and the first consul appears no where in a disadvantageous light. We certainly discover nothing assumed or overbearing in his manner; his expressions are sometimes quaint, and his language and turn of thought have occasionally something of that peculiarity which marks his state papers: but generally his conceptions are just and his language is clear, and he is always inclined to take the liberal side of the question. If the literary intercourse between the countries could be renewed, we shall endeavour to furnish ourselves with such works as will enable us to lay before our readers a complete view of the *Napoleon* legislation.

Review of Hillhouse's Amendment to the Constitution of the United States.

[From the Edinburgh Review, vol. 12, 1808.]

Propositions for amending the constitution of the *United States of America*, submitted by Mr. *Hillhouse* to the senate of the *United States*, on the 12th day of *April* 1808, with his explanatory remarks. 12mo. pp. 60. *Washington* and *New-York*, 1808.

THIS is one of the works which mark, in a striking manner, the difference between a new and an established government. Mr. *Hillhouse*, a soberminded and experienced senator, representing the most sagacious and least revolutionary state in the union (*Connecticut*), comes forward with a series of propositions for newmodelling the general government, and changing the functions both of the executive and of the higher branch of the legislature; and those propositions are deliberately canvassed, and ordered to be printed by authority of the senate, for the general information of the country. Such discussions would be regarded on this side of the *Atlantic* as the immediate precursors of a radical revolution; while, in *America*, they are universally considered, not only as perfectly innocent, but as laudable and salutary. The contemplation of these things may teach us some lessons; and at a time when the foreign relations of these rising communities excite so general an interest in *Europe*, we think it our duty to lay before our readers whatever may tend to throw light on their internal condition. With this view, we shall present them with a slight analysis of the little pamphlet before us, premising a short account of the constitution which it is intended to reform.

At the close of that unfortunate contest, which terminated in the independence of the *British* colonies, the first object that engaged the attention of the citizens of the newly created empire was the government they were in future to live under. The body, under whose auspices the war had been conducted was nothing more than an assembly denominated the congress, composed of delegates from the several states, who, without pretending to any authority over the individual citizens, or even over the states in their collective capacity, issued *recommendations* to the different legislatures, which, being the suggestions of wisdom and patriotism, and given at a period of alarm and danger, were in most instances implicitly obeyed. The functions of this government, however, naturally ceased with the conjuncture which gave it birth. On the return of peace, its recommendations were disregarded; and it was soon discovered, that if the union of the states was to be preserved, a more efficacious government was indispensably necessary.

In the organization of the *state governments* no great difficulty was experienced. Under the old *regime* the greater part of the colonies had been governed by a house of assembly chosen by the people, together with a governor and council appointed by the king. The only alteration, therefore, that was required by the revolution, was to transfer to the people that portion of authority which had hitherto been exercised by the sovereign. In addition to the house of assembly which they had always chosen, they elected, in most of the states, a council under the name of a senate, and an executive, denominated the governor; and with these alterations the state governments resumed their functions.

The establishment of a national government, however, was obviously a much more arduous undertaking. Their separation from the mother country having deprived the states of the common prop on which they had hitherto rested, they were naturally led to lean towards each other; but not having, as in the case of the state governments, any model to direct them, it became a matter of much uncertainty how the connexion of the states was in future to be maintained. The state

governments were buildings already erected, which, in consequence of the revolution, merely changed their inhabitants; but the fabric of the national government was to be built from the foundation, on a plan which was yet to be devised and considered. Some common government seemed necessary to the welfare of the union; but how this government was to be constructed, how far its powers were to encroach on the separate sovereignty of the states, and to what objects these powers were to be directed, were all matters of very nice and difficult arrangement. The opinions of the citizens of the *United States* on this momentous subject, were as various as might be expected from the variety of interests, of prejudices and passions, which must necessarily exist in such a community. Some called in question even the necessity of union; others, admitting the necessity of a common government, maintained that this government ought to be purely federal, and in no respect national; that is to say, that its ordinances should be binding only on the state legislatures, and not on the citizens individually considered. A third party asserted the expediency of a government exercising authority over the whole mass of the population. With respect to the nature and constitution of the organs, by which the powers of the general government were to be discharged, the difference of sentiment was equally great. In order to reconcile their discordant opinions, and obtain some form of government, without which it was apparent that the *United States*, as a nation, could no longer exist, a convention was held at *Philadelphia* in the year 1787, composed of the most illustrious citizens of the union, and dignified with the presence of *Washington* and *Franklin*. After having deliberated for several months, this august assembly at length produced the constitution which was soon afterwards adopted; and under which the *United States* have, for twenty years, been advancing to power and opulence, with a rapidity unexampled in history.

The best account of this constitution, is to be found in a publication called the *Federalist*, written principally by the late general *Hamilton*; a work little known in *Europe*, but which exhibits an extent and precision of information, a pro-

fundity of research, and an acuteness of understanding, which would have done honour to the most illustrious statesmen of ancient or modern times.

The defects which, on a view of this constitution, immediately strike us as inherent in its composition, are weakness and instability. It has the appearance indeed, rather of an experiment in politics, than of a steady permanent government; and in this view, as we gather from the speech made by *Franklin*, previous to giving his vote for its adoption, it was regarded by the most distinguished members of the convention, with which it originated. We have particular access indeed to know, that general *Hamilton*, who assisted in its formation, and who was regarded as the most enlightened man in the country, was used to express his conviction, that it had not within it the means of selfpreservation. Its framers themselves, therefore, were far from maintaining its excellence. Like *Salon of old*, they offered it to their countrymen only as the best which their peculiar circumstances would admit of.

The establishment of a more stable government was rendered peculiarly difficult, by the immense rapidity with which the *United States* were advancing. A country in which every thing is varying and increasing, cannot well have a permanent government. The insular situation of *Great Britain* seems to be a principal cause of the peculiar steadiness of the government under which we live. The bounds of our country are defined by nature; the population, though increasing, advances so slowly, as to produce no sensible impression on the machine of government; and, when it arrives at a certain pitch, is relieved by emigration, by war, and the other evils incident to an old country. The territory of the *United States*, when compared with that of the most conspicuous nations of *Europe*, deserves almost the epithet of boundless. At the time when the constitution was framed, this immense region contained only between three and four millions of souls. Its constitution, therefore, was adapted to a thin and scattered population; but it could not escape the penetration of its founders, that a government, which was suitable to the weak-

ness of infancy, might be very ill adapted to the vigour of manhood.

Besides the smallness of the population in proportion to the extent of the territory, there were other circumstances in the situation of the *United States* which naturally suggested the idea of a republican, and even a democratical government. The population of the *United States* was of a peculiar description. Every man, possessing a certain share of property, had an interest in the general welfare. The agricultural interest greatly predominated. The greater part of the inhabitants of the *United States* cultivated their own farms, and were distinguished by those habits of industry, morality, and intellectual acuteness, which are the natural result of that situation. There was no *mob*, in short, no dissolute and servile populace in the country. When a considerable number of this class exists in any community, it may be pronounced unfit for a republican government. It must not at the same time be overlooked, that the distance of *America* from *Europe*, and the absence of any formidable enemy on the frontier, favoured the introduction of a republican government. Had any formidable neighbour rendered it necessary for the *United States* to maintain a considerable standing army, or to engage in frequent hostilities, we may pronounce, with certainty, that their present form of government could not have subsisted. The slender tie which holds them together would burst at once in the tumult of war. But, placed at a distance from the great theatre of contention and bloodshed, devoting themselves to the arts of peace, and studiously avoiding all occasions of hostility, they have hitherto prospered under a republican government; while the violent political contentions incident to such a constitution have supplied, in some measure, that agitation which in *Europe* is excited by war, and without which it seems impossible for any collection of men to maintain their vigour and activity.

In governments, as in every human institution, there is always found a mixture of good and evil. The most despotic have their benefits, the most free their disadvantages. The great recommendation of a republican government, as applied

to the *United States*, is, that it affords full scope to the growing energies of the nation, imposing on them no greater burdens or restrictions than are essential to their complete development. But this advantage is purchased at the expense of an evil, which must exist in a greater or less degree in every free government, and has already risen to a most disagreeable, and even alarming height, in the *United States*. The evil we allude to is party spirit. It being essential to a republican government that the supreme rulers of the country should derive their power immediately from the people, and be chosen by them, these elections are naturally productive of very violent contests and furious animosities among the friends of the different candidates. It must always be kept in mind, that, in the *United States*, not only the legislative assemblies, but the chief magistrate, is chosen by a general election, held every four years throughout the union. Such an election, in almost any country of *Europe*, would be the signal for civil war; and although no such effect has hitherto resulted from it in *America*, because the country is thinly peopled, because there is no standing army, and because the office of chief magistrate is, comparatively speaking, of trifling importance; yet, in proportion as the country advances, these circumstances must be changed; and the *United States* will then be exposed to that multiplicity of evils which the periodical election of a chief ruler in an extensive country is calculated to produce. Already, according to Mr. *Hillhouse*, these evils are serious and alarming.

“Of the impropriety,” he asks, “and impolicy of the present mode of electing a president, can there be stronger proof, can there be more convincing evidence, than is now exhibiting in the *United States*? In whatever direction we turn our eyes, we behold the people arranging themselves under the banners of different candidates, for the purpose of commencing the electioneering campaign for the next president and vice-president. All the passions and feelings of the human heart are brought into the most active operation. The *electioneering* spirit finds its way to every *fireside*, pervades our domestic circles, and threatens to destroy the enjoyment of social har-

mony. The seeds of *discord* will be sown in families, among friends, and throughout the whole community. In saying this, I do not mean any thing to the disadvantage of either of the candidates. They may have no agency in the business. They may be the involuntary objects of such competition, without the power of directing or controlling the storm. The fault is in the mode of election, in setting *the people* to choose *a king*. In fact, a popular election, and the exercise of such powers and prerogatives as are by the constitution vested in the president, are incompatible. The evil is increasing, and will increase, until it shall terminate in civil war and despotism. The people, suffering under the scourge of party feuds and factions, and finding no refuge under the state, any more than in the general government, from party persecution and oppression, may become impatient, and submit to the first *tyrant* who can protect them against the *thousand tyrants*."

To suggest a remedy for this great and growing evil, is the leading object of the propositions before us.

"It can be remedied," Mr. *Hillhouse* observes, "only in two ways: Either the office of president must be stripped of its high prerogatives and powers, or some other mode of appointing a president must be devised than that of popular election."

He is of opinion that both of these means ought to be employed. He proposes to reduce the president's terms of service from four years to one; to reduce his salary from 25,000 to 15,000 dollars per annum; to transfer from him to the legislature the power of appointing to and removing from office; and, as to the mode of appointing the chief magistrate, he intends that he shall be annually chosen *by lot* from a certain number of the senate. Mr. *Hillhouse* intends likewise, that the house of representatives, instead of serving, as at present, for two years, shall henceforth serve only for one; and that the term of service of the senate shall also be reduced from six to three years.

If this mode of appointing a president shall be adopted, Mr. *Hillhouse* flatters himself that the following advantages will result from it.

" 1st, It will make the senate more respectable.

" 2d, It is prompt and certain.

" 3d, It will avoid the evils of a disputed election, which is now unprovided for in the constitution.

" 4th, It will exclude intrigue and cabal.

" 5th, It gives talents and modest merit an equal chance.

" 6th, It is economical.

" 7th, It gives to the people a president of the *United States*, and not the chief of a party.

" 8th, It removes temptation to use power, otherwise than for the *public good*.

" 9th, It will annihilate a *general* party pervading the whole *United States*.

" 10th, It will remove a direct, powerful, and dangerous influence of the general government on the individual states.

" 11th, It will prevent the influence of a presidential election on our *domestic concerns* and *foreign relations*.

" 12th, And it will secure the *United States* against the usurpations of power, and every attempt, through fear, interest, or corruption, to sacrifice their interest, honour, or independence; for one year is too short a time in which to contrive and execute any extensive and dangerous plan of unprincipled ambition; and the same person cannot be president during two successive years."

Mr. *Hillhouse* therefore expects, that when amended in the manner proposed by him, the *United States* would enjoy the respective advantages of elective and hereditary governments, combining the freedom of the one with the tranquillity of the other. We should now consider how far his expectations are likely to be fulfilled.

The amendment regarding the president consists, as we have already stated, of two parts; namely, making the office itself less the object of ambition, and appointing to it *by lot*, instead of election. By the latter arrangement, there can be no doubt that the senate would be made more respectable; because each state, in electing its quota of senators, two in number, would consider itself as nominating, at the same time, two candidates for the presidency. It would likewise

avoid the evils of a disputed presidential election. But is it not obvious that it would add nearly as much turbulence to the senatorial as it took from the presidential elections? That quantity of popular agitation, corruption, and intrigue, which used to be called forth at every election of a president, would not by this means be annihilated. It would be merely transferred to the election of senators; with this difference, that, under the present system, it occurs only once in four years, and, according to Mr. *Hillhouse's* scheme, the nation would be disturbed with it every three years. As to the fourth advantage, the destruction of cabal and intrigue, it is by no means certain that fraud and collusion would not be employed even at the drawing of the great lottery. Neither would it give to the people a president of the *United States*, instead of the chief of a party. Every nation, which in any considerable degree governs itself, must be divided into parties; every assembly, chosen by such a nation, must be divided into corresponding parties; every senator, therefore, must belong to one party or another; and, whether chosen by lot or by election, the president of the *United States* would infallibly be the leader of the party with which he had previously been accustomed to act.

But, supposing that all the advantages enumerated by Mr. *Hillhouse* did result from the appointment of the president by lot; it appears to us, that there would necessarily arise, from the privation of the powers and prerogatives he at present exercises, evils more than sufficient to counterbalance all the benefits that would attend them. The most fatal consequences are to be apprehended from breaking down the barriers at present interposed between the *executive* and the *legislature* of the *United States*. It is among the most certain maxims of political philosophy, that the independence of the executive is no less essential to freedom than that of the legislature itself. Any scheme, therefore, which would at once invest the legislature with executive authority, may well be regarded with suspicion. It is as dangerous to permit a body of men to execute laws, as to allow a single man to enact them. The power of appointing to, and removing from office, is unques-

tionably an appendage of the executive government; and cannot be taken from the president of the *United States* without depriving him of the weight and dignity which are indispensable to the vigorous and effectual discharge of his important office. It is certain, too, that if no fit depositary of this executive power is provided by the constitution, some one will establish itself in spite of the constitution; and this will be the turbulent leader of a legislative body, who, under pretence of promoting the interests of his fellow citizens, will contrive to become their master. By electing the president out of the senate, especially if, as Mr. *Hillhouse* imagines, this body, in consequence of serving for a shorter time, would consist in general of the same members, his constitutional independence would be still further impaired, and his interests identified with those of the senate. In a word, it seems evident, that if the people of the *United States* were desirous of making such alterations on their constitution as should be likely to convert it into an oligarchy, and at no distant period into a despotism, they could not adopt a better plan than that proposed by Mr. *Hillhouse*.

For our own part we will confess, that in speculating on the future fortunes of the *American* republic, it is not to the dissensions excited by the election of the president, but to the disproportionate strength and efficacy of its separate state governments, that we should be disposed to look with the greatest apprehension. The constitution of *America* is a sort of compromise between a confederation of independent nations, and a simple republican government; and, like all other compromises, involves both absurdities and inconveniences. It was merely the accidental circumstance of having been formerly governed as separate colonies, that suggested to this people the idea of a federal union; for nothing surely could be more preposterous than for three millions of men to divide themselves into thirteen nations. When we speak of *America*, therefore, as one country, and reason about its greatness or stability, we think only of its general government, and drop all consideration of its separate state legislatures. Now, the greatest hazard by far to which this national government, and

with it the national greatness and prosperity, is exposed, arises, in our apprehension, from the existence and the powers of those subordinate constitutions. They not only exhibit the old absurdity of a wheel within a wheel, but evidently hold out facilities to the dismemberment and dissolution of the general government. When a measure, indispensable to the *general* welfare, happens to be disadvantageous to the inhabitants of a particular district, they will be discontented and querulous in all cases, we may depend on it, in spite of patriotism and public spirit. But if they are merely individual citizens of one great community, their discontent will not go beyond murmurs and clamours, and will not affect the stability of the government. When every district, however, is organized like a separate nation, and exercises legislative and sovereign authority over its own population, it is easy to see how formidable its local discontents may become, and how readily a partial interest may lead it to throw off its allegiance to the general government. They are each ready to set up for themselves; and they know very well, that the general government has no power to compel them to adhere to it longer than they conceive it to be for their advantage. Instead of making new regulations as to the office and election of the president, therefore, we do think it would be better worth while for the *American* reformers to think of gradually dissolving their state governments, and really incorporating themselves into one people and one name. Instead of electing so many members to congress for each state, let them elect so many for every hundred thousand male adults; and instead of having half their laws made in one place, and half in another, let them trust the whole manufacture to the master-workmen of the country.

While they remain at peace, however, and continue to prosper, their present government will answer well enough. The truth is, that in such a situation they scarcely require any government at all; and their political arrangements are rather matters of speculation to the ambitious than the concernment of the truly patriotic. But war would give a tremendous shock to all these arrangements; nor do we see

indeed how they could maintain any considerable army without the adoption of a different system of government. The very high wages of labour would make the expense of their establishment far greater than in any other country in the world; and their antipathy to all sorts of taxes would make it far more difficult to defray that expense. The government would become unpopular on occasion of the slightest disaster. Party spirit and local interests would easily graduate into rebellion, and the whole frame of the constitution, it appears to us, would be in danger of falling to pieces.

With the spirit and intelligence, and the long habit and practice of liberty which exists in *America*, we do not exactly apprehend that they will ever fall into a state of political servitude. But we do think, that they are still destined to undergo something of the nature of a revolution, and are very far from considering their present constitution as that pattern of perfection which they are sometimes disposed to represent it. It arose, like other imperfect systems of government, out of great and pressing emergencies; and was dictated, in a great degree, by circumstances which may be considered as accidental. The publication before us shews what opinion is entertained of it among its own statesmen and legislators; and we are inclined to think that those who attentively consider the subject, will be convinced that Mr. *Hillhouse* has succeeded better in exposing the evil than in devising the remedy, and that there are evils of a greater magnitude than those which he has specified.

BIOGRAPHICAL.

GEORGE WYTHER, Esq.

GEORGE WYTHER, chancellor of *Virginia*, and a distinguished friend of his country, was born in the county of *Elizabeth City* in 1726. His father was a respectable farmer, and his mother was a woman of uncommon knowledge and strength of mind. She taught the *Latin* language, with which she was intimately acquainted, and which she spoke fluently, to her son; but his education was in other respects very much neglected. At school he learned only to read and write, and to apply the five first rules of arithmetic. His parents having died before he attained the age of twenty-one years, like many unthinking youths he commenced a career of dissipation and intemperance, and did not disengage himself from it before he reached the age of thirty. He then bitterly lamented the loss of those nine years of his life, and of the learning which during that period he might have acquired. But never did any man more effectually redeem his time. From the moment when he resolved on reformation he devoted himself most intensely to his studies. Without the assistance of any instructor he acquired an accurate knowledge of the *Greek*, and he read the best authors in that as well as in the *Latin* language. He made himself also a profound lawyer, becoming perfectly versed in the civil and common law, and in the statutes of *Great Britain* and *Virginia*. He was also a skilful mathematician, and was well acquainted with moral and natural philosophy. The wild and thoughtless youth was now converted into a sedate and prudent man, delighting entirely in literary pursuits. At this period he acquired that attachment to the

christian religion, which, though his faith was afterwards shaken by the difficulties suggested by sceptical writers, never altogether forsook him, and towards the close of his life was renovated and firmly established. Though he never connected himself with any sect of christians, yet for many years he constantly attended church, and the bible was his favourite book.

Having obtained a license to practice law, he took his station at the bar of the old general court with many other great men, whose merit has been the boast of *Virginia*. Among them he was conspicuous not for his eloquence or ingenuity in maintaining a bad cause, but for his sound sense and learning, and rigid attachment to justice. He never undertook the support of a cause which he knew to be bad, or which did not appear to be just and honourable. He was even known, when he doubted the statement of his client, to insist upon his making an affidavit to its truth; and in every instance where it was in his power he examined the witnesses as to the facts intended to be proved before he brought the suit or agreed to defend it.

When the time arrived which heaven had destined for the separation of the wide, confederated republic of *America* from the dominion of *Great Britain*, Mr. *Wythe* was one of the instruments in the hand of providence for accomplishing that great work. He took a decided part in the very first movements of opposition. Not content merely to fall in with the wishes of his fellow citizens, he assisted in persuading them not to submit to *British* tyranny. With a prophetic mind he looked forward to the event of an approaching war, and resolutely prepared to encounter all its evils rather than to resign his attachment to liberty. With his pupil and friend, *Thomas Jefferson*, he roused the people to resistance. As the controversy grew warm, his zeal became proportionally fervent. He joined a corps of volunteers, accustomed himself to military discipline, and was ready to march at the call of his country. But that country, to whose interests he was so sincerely attached, had other duties of more importance for him to perform. It was his destiny to obtain distinction as a statesman,

legislator, and judge, and not as a warrior. Before the war commenced he was elected a member of the *Virginia* assembly. After having been for some time speaker of the house of burgesses he was sent by the members of that body as one of their delegates to the congress which assembled *May 18, 1775*, and did not separate until it had declared the independence of *America*. In that most enlightened and patriotic assembly he possessed no small share of influence. He was one of those who signed the memorable declaration by which the heroic legislators of this country pledged "their lives, their fortunes, and their sacred honour" to maintain and defend its violated rights. But the voice of his native state soon called him from the busy scene where his talents had been so nobly exerted. By a resolution of the general assembly of *Virginia*, dated *November 5, 1776*, *Thomas Jefferson*, *Edmund Pendleton*, *George Wythe*, *George Mason*, and *Thomas Ludwell Lee* were appointed a committee to revise the laws of the commonwealth. This was a work of very great labour and difficulty. The committee of revisors did not disappoint the expectations of their country. In the commencement of their labours they were deprived of the assistance which might have been received from the abilities of Messrs. *Mason* and *Lee*, by the death of one and the resignation of the other. The remaining three prosecuted their task with indefatigable activity and zeal, and *June 18, 1779*, made a report of one hundred and twenty-six bills which they had prepared. This report shewed an intimate knowledge of the great principles of legislation, and reflected the highest honour upon those who formed it. The people of *Virginia* are indebted to it for almost all the best parts of their present code of laws. Among the changes then made in the monarchical system of jurisprudence which had been previously in force, the most important were effected by the act abolishing the right of primogeniture and directing the real estate of persons dying intestate to be equally divided among their children or other nearest relations; by the act for regulating conveyances, which converted all estates in tail into fee-simple, and thus destroyed one of the supports of the proud and overbearing distinctions of particular families;

and finally by the act for the establishment of religious freedom. Had all the proposed bills been adopted by the legislature, other changes of great importance would have taken place. A wise and universal system of education would have been established, giving to the children of the poorest citizen the opportunity of attaining science, and thus of rising to honour and extensive usefulness. The proportion between crimes and punishments would have been better adjusted, and malefactors would have been made to promote the interests of the commonwealth by their labour. But the public spirit of the assembly could not keep pace with the liberal views of *Wythe*.

After finishing the task of new modelling the laws, he was employed to carry them into effect according to their true intent and spirit, by being placed in the difficult office of judge of a court of equity. He was appointed one of the three judges of the high court of chancery, and afterwards sole chancellor of *Virginia*, in which station he continued until the day of his death, during a period of more than twenty years. His extraordinary disinterestedness and patriotism were now most conspicuously displayed. Although the salary allowed him by the commonwealth was extremely scanty, yet he contentedly lived upon it even in the expensive city of *Richmond*, and devoted his whole time to the service of his country. With that contempt of wealth which so remarkably distinguished him from other men, he made a present of one half of his land in *Elizabeth* city to his nephew, and the purchase money of the remainder, which was sold, was not paid him for many years. While he resided in *Williamsburg* he accepted the professorship of law in the college of *William and Mary*, but resigned it when his duties as chancellor required his removal to *Richmond*. His resources were therefore small; yet with his liberal and charitable disposition he continued, by means of that little, to do much good, and always to preserve his independence. This he accomplished by temperance and economy.

He was a member of the *Virginia* convention, which in June 1788 considered the proposed constitution of the *United*

States. During the debates he acted for the most part as chairman. Being convinced that the confederation was defective in the energy necessary to preserve the union and liberty of *America*, this venerable patriot, then beginning to bow under the weight of years, rose in the convention and exerted his voice, almost too feeble to be heard, in contending for a system on the acceptance of which he conceived the happiness of his country to depend. He was ever attached to the constitution, on account of the principles of freedom and justice which it contained; and in every change of affairs he was steady in supporting the rights of man. His political opinions were always firmly republican. Though in 1798 and 1799 he was opposed to the measures which were adopted in the administration of president *Adams*, and reprobated the alien and sedition laws, and the raising of the army, yet he never yielded a moment to the rancour of party spirit, nor permitted the difference of opinion to interfere with his private friendships. He presided twice successively in the college of electors in *Virginia*, and twice voted for a president whose political principles coincided with his own. After a short but very excruciating sickness he died *June* 8, 1806, in the eighty-first year of his age. It was supposed that he was poisoned, but the person suspected was acquitted by a jury of his countrymen. By his last will and testament he bequeathed his valuable library and philosophical apparatus to his friend Mr. *Jefferson*, and distributed the remainder of his little property among the grandchildren of his sister and the slaves whom he had set free. He thus wished to liberate the blacks not only from slavery, but from the temptations to vice. He even condescended to impart to them instruction; and he personally taught the *Greek* language to a little negro boy, who died a few days before his preceptor.

Chancellor *Wythe* was indeed an extraordinary man. With all his great qualities he possessed a soul replete with benevolence, and his private life is full of anecdotes, which prove that it is seldom that a kinder and warmer heart throbs in the breast of a human being. He was of a social and affectionate disposition. From the time when he was emancipated from

the follies of youth he sustained an unspotted reputation. His integrity was never even suspected. While he practised at the bar, when offers of an extraordinary but well merited compensation were made to him by clients whose causes he had gained, he would say, that the labourer was indeed worthy of his hire, but the lawful fee was all he had a right to demand, and as to presents he did not want and would not accept them from any man. This grandeur of mind he uniformly preserved to the end of his life. His manner of living was plain and abstemious. He found the means of suppressing the desire of wealth by limiting the number of his wants. An ardent desire to promote the happiness of his fellow men by supporting the cause of justice and maintaining and establishing their rights appears to have been his ruling passion.

As a judge he was remarkable for his rigid impartiality and sincere attachment to the principles of equity, for his vast and various learning, and for his strict and unwearied attention to business. Superior to popular prejudice and every corrupting influence, nothing could induce him to swerve from truth and right. In his decisions he seemed to be a pure intelligence, untouched by human passions, and settling the disputes of men according to the dictates of eternal and immutable justice. Other judges have surpassed him in genius, and a certain facility in despatching causes, but while the vigour of his faculties remained unimpaired, he was seldom surpassed in learning, industry and judgment.

From a man entrusted with such high concerns, and whose time was occupied by so many difficult and perplexing avocations, it could scarcely have been expected that he should have employed a part of it in the toilsome and generally unpleasant task of the education of youth. Yet even to this he was prompted by his genuine patriotism and philanthropy, which induced him for many years to take great delight in educating such young persons as shewed an inclination for improvement. Harassed as he was with business, and enveloped with papers belonging to intricate suits in chancery, he yet found time to keep a private school for the instruction of a few scholars, always with very little compensation, and

often demanding none. Several living ornaments of their country received their greatest lights from his sublime example and instruction. Such was the upright and venerable *Wythe*. *American Gleaner and Virginia Magazine*, i. 1—3, 17—19, 33—36; *Massa. Miss. Mag.* v. 10—15; *Debates of Virginia Convention*, second edit. 17, 421.

CHARACTER OF LORD CHIEF JUSTICE HALES.

[From the Life of Francis North, Baron of Guilford.]

IT was the lord keeper *North's* good fortune to enter his practice in the circuits under this judge, whose reputation for his great ability in the law and rigorous justice will be very long lived in *Westminster Hall* and the inns of court and chancery; for there was a conjunction of characters; his and the times conspiring to aggrandize it. After having improved his knowledge as a student by reporting from him when he sat as judge of the *common pleas*, and as a practiser in the northern circuits, it so happened, that in the unaccountable rolling of preferments in the law, it became his lordship's province to judge of, and for cause apparent, to correct the errors of that great man. The truth is, his lordship took early into a course diametrically opposite to that approved by *Hales*: for the principles of the former being demagogical, could not allow much favour to one who rose a monarchist declared. Then, after the latter, by being made chief justice of the common pleas, together with the other judges of that court, and those of the exchequer, had jurisdiction of errors in judgment given by the court of king's bench, the separation was wider; and the old judge, by a certain formal overlooking of him, and refining of arguments against all he appeared for, affected to shew it. And, to say truth, that judge had acquired an authority so transcendent, that his opinions were, by most lawyers and others, thought incontestible; and he was

habituated in not bearing contradiction, and had no value for any person whatever that did not subscribe to him. His lordship knew him perfectly well, and revered him for his great learning in the history, law and records of the *English* constitution. I have heard him say that while *Hales* was chief baron of the exchequer, by means of his great learning, even against his inclination, he did the crown more justice in that court than any others in his place had done with all their good will and less knowledge. But his lordship knew also his foible, which was leaning towards the popular; yet, when he knew the law was for the king (as well he might, being acquainted with all the records of the court, to which men of the law are commonly strangers) he failed not to judge accordingly.

He was an upright judge if taken within himself; and when he appeared, as he often did and really was, partial, his inclination or prejudice, insensibly to himself, drew his judgment aside. His bias lay strangely for and against characters and denominations; and sometimes the very habits of persons. If one party was a courtier and well dressed, and the other a sort of puritan with a black cap and plain clothes, he insensibly thought the justice of the cause with the latter. If the dissenting or anti-court party was at the back of a cause, he was very seldom impartial; and the loyalists had always a great disadvantage before him. And he ever sat hard upon his lordship in his practice in causes of that nature, as may be observed in the cases of *Cutts & Pickering*, just before, and of *Soams & Barnardiston*, elsewhere related. It is said he was once caught. A courtier who had a cause to be tried before him got one to go to him as from the king, to speak for favour to his adversary, and so carried his point; for the chief justice could not think any person to be in the right that came so unduly recommended.

He became the cushion exceeding well. His manner of hearing patient, his directions pertinent, and his discourses copious; and although he hesitated often, fluent. His stop for a word, by the produce, always paid for the delay; and on some occasions he would utter sentences heroic. One of the bankers, a courtier, by name *Sir Robert Viner*, when he was

lord mayor of *London*, delayed making a return to a *mandamus*, and the prosecutor moved for an attachment against him. The recorder, *Howell*, appeared; and, to avert the rule for an attachment, alleged the greatness of his magistracy; and the disorder that might happen in the city if the mayor were imprisoned. The chief justice put his thumbs in his girdle, as his way was, and, *tell me of the mayor of London*, said he; *tell me of the mayor of Queenborough*. But still this was against the court. He put on the show of much valour, as if the danger seemed to lie on that side from whence either loss of his place (of which he really made no account) or some more violent, or, as they pretended, arbitrary infliction might fall upon him. Whereas, in truth, that side was safe, which he must needs know, and that all real danger, to a judge, was from the impetuous fury of a rabble, who have as little sense and discretion as justice; and from the house of commons, who seldom want their wills, and for the most part, with the power of the crown, obtain them. Against these powers he was very fearful; and one bred as he was, in the rebellious times, when the government at best was but rout and riot, either of rabble committees or soldiers, may be allowed to have an idea of their tyranny, and consequently stand in fear of such brutish violence and injustice as they committed. But it is pleasant to consider that this man's not fearing the court was accounted valour; that is, by the populace, who never accounted his fear of themselves to have been a mere timidity.

Whatever his courage or fear was, it is most certain his vanity was excessive; which grew out of a self-conversation, and being little abroad. But when he was off from the seat of justice, and at home, his conversation was with none but flatterers. He was allowed on all hands to be the most profound lawyer of his time; and he knew it. But that did not serve him, but he would be also a profound philosopher, naturalist, poet and divine, and measured his abilities in all these by the scale of his learning in the law, which he knew how to value: and if he postponed any, it was the law to all the rest; for he was so bizarr in his dispositions, that he

almost suppressed his collections and writings of the law, which were a treasure, and being published, would have been a monument of him beyond the power of marble. But instead of that, he ordered them to be locked up in *Lincoln's Inn* library, and made no scruple to send forth little tracts in philosophy, as the *Nongravitation of Fluids*, *Difficiles Nugæ*, prosecuting the same *viæ* or trifles upon the baroscope; which made sir *William Jones* say that his whole life (meaning in private, as I suppose,) was *nugarum plena*, or made up of trifles. His *Origination of Mankind*, in appearance a great work, with nothing in it, and that which scarce any one ever read or will read. And what is very remarkable, the very childish ignorance of his subject shewed in these books is dressed in most accurate method, proper expression, and significant *English* style, better than which one would not desire to meet with as a temptation to read. He published much in speculative devotion, part prose, part verse; and the latter hobbled so near the style of the other as to be distinguished chiefly by being worse. But his matter and language not in rhyme was pious and good. He took a fancy to be like *Pomponius Atticus*, or one that kept above water in all times, and well esteemed by all parties. He published a short account of that noble *Roman's* life, and, at the entrance, a translation of the same in *Cornelius Nepos*, but so ill done as would have brought the rod over the back of a school boy. A hard censure without proof, therefore take the following instances: 1. *Et elatus est in lecticula*; which means that (after he was dead) *he was carried out upon a bier*. The word *efferre* is peculiarly proper in that place. But he rendered it *he was lifted up in his bed*. Then 2. *Et sic globus consensionis, dissensione uetus hominis, disjectus est*. That is, *and so that confederated party was broke by one man's leaving them*. But he—and so that ball of contention, by the dissent of one man, was let fall. So miserably will the learnedest men err that presume out of their sphere, and fail in that great point of wisdom, the knowing one's self.

This great man was most unfortunate in his family, for he married his own servant maid, and then, for excuse, said

there was no wisdom below the girdle. All his sons died in the sink of lewdness and debauchery; and if he was to blame in their education it was by too much of rigour rather than of liberty; which (rigour) *Montagne* says seldom fails of that consequence. Although he was very grave in his own person, he loved the most bizarr and irregular wits, in the practice of the law before him, most extravagantly. And, besides, he was the most flatterable creature that ever was known; for there was a method of resignation to him, and treating him with little meals, and private, with his pipe, at ease, which certainly captivated him. So sir *George Jeffries* gained as great an ascendant in practice over him as ever counsel had over a judge. In short, to give every one his due, there was in him the most of learning and wisdom, joined with ignorance and folly, that ever was known to coincide in the character of any one man in the world.

His lordship, of whom I write, by his extent of bar practice, while he stood in the front, on the one side or the other, in most, or rather every great cause that moved in *Westminster Hall*, had a full view of this great man; and very often observing him a slave to prejudice, a subtilizer, and inventor of unheard of distinctions, and exercising criticisms to get the better of known maxims of the law, and thereby to transmit great estates and interests from some persons and families to others, and knowing well these infirmities of his, was not moved at all at what he did. And this overruling temper of his did not so much take place in small concerns; and in those between common men; for there his justice shined most, and armed him with reputation that sustained his authority to do as he pleased in greater. Whereby it seems that if he never had dealt in other but great causes, to hear and determine them; he might have been accounted the worst judge that ever sat. But although his lordship was not surprized at this behaviour of the chief justice, yet he was very much concerned to see the generality, both gentle and simple, lawyers and laymen, idolize him as if there had never been such a miracle of justice since *Adam*. His voice was oracular and his person little less than adored. And his lordship knew also that this

fascination proceeded from faction, and had at the root more of confederacy than judgment; for because the chief justice was in principle averse to monarchy and the court, they all with one voice exalted him, in order to have him lead the law and all the lawyers that way, and left no room for just thoughts of him, which attributed enough of honour and commendation, but all that he said was right, and whoever said to the contrary was wrong. In opposition to this impetuous, or, rather, rage of reputation, (under which his lordship himself was a sufferer, as may be seen elsewhere,) his lordship thought fit to note down the several instances in his own observation of this judge's fondness and partiality; which he intended to have explained at large when he was at leisure and should have had a disposition so to do.

[Several instances are here related, but they do not appear to be of any consequence at present, and are therefore omitted. The following, however, deserves notice.]

"That juries cannot be fined for slighting evidence and directions contrary to reason and the whole course of precedents."*

This was popular, and the law stands so settled. The matter is trust, whether the court or the jury. The court may abuse a trust in an undue punishment of jurymen, as in any other act of justice; and, on the other side, juries may abuse their trust; as, soon after, was done with a vengeance, in the scandalous instances of *ignoramus* juries. The precedents ran all for the trust on the side of the court: what reason to change it (which was changing the law) but popularity?

Here I have done with this very great lawyer, the lord chief justice *Hales*. And I must not part without subjoining my solemn protestation that nothing is here set down for any invidious purposes, but merely for the sake of truth; first, in general, for all truth is profitable; and secondly, in particular, for justice to the character I write of, against whom never any thing was urged so peremptorily as the authority of *Hales*; as

[* This is the lord keeper's original note, which the biographer illustrates by a commentary.]

if one must of necessity be in the wrong, because another was presumed to be in the right. These two chiefs were of different opinions in matters of private right, as well as touching the public. And if one were a *Solomon*, saint, and oracle, what must the other be taken for? Therefore I have understood it absolutely necessary for me, as (assisted with his lordship's own notes) I have done, to shew *Hales* in a truer light than when the age did not allow such freedom, but accounted it a delirium, or malignancy at least, not to idolize him; and thereby to manifest that he had his frailties, defects, prejudices and vanities, as well as excellencies; and that he was not a very touchstone of law, probity, justice, and public spirit as in his own time he was accounted: but that some that did not agree with him might have those virtues as eminently in the eye of a just observer. This is the only consideration that moved me so freely to display the matters foregoing; wishing only that I had means or ability of doing it with more punctuality. I conclude with this observation, that it is a general error of the community, learned and unlearned, when a man is truly great in some capacities, by the measure of them to magnify him in all others, wherein he may be a shallow pretender. But it is the office of a just writer of the characters of men, to give every one his due and no more.

SIR WILLIAM SCROGGS,

Lord Chief Justice of the Court of King's Bench.

[From the Life of Lord Keeper Guilford.]

THIS *Sir William Scroggs* was made lord chief justice of the king's bench while his lordship sat in the common pleas. He was of mean extract, having been a butcher's son, but wrought himself into business in the law, was made a serjeant and practised under his lordship. His person was large, visage comely, and speech witty and bold. He was a

great voluptuary and companion of the high court rakes, as *Ken*, *Guy*, &c. whose merits, for aught I know, might prefer him. His debaucheries were egregious, and his life loose, which made the lord chief justice *Hales* detest him. He kept himself very poor, and when he was arrested by king's bench process, *Hales* would not allow him the privilege of a serjeant, as is touched elsewhere. He had a true libertine principle. He was preferred for professing loyalty: but *Oates* coming forward with a swinging popularity, he (as chief justice) took in and ranted on that side most impetuously. It fell out that when the earl of *Shaftesbury* had sat some short time in the council and seemed to rule the roast, yet *Scroggs* had some qualms in his politic conscience; and, coming from *Windsor* in the lord chief justice *North's* coach, he took the opportunity and desired his lordship to tell him seriously if my lord *Shaftesbury* had really so great a power with the king as he was thought to have. His lordship answered quick, *No, my lord, no more than your footman hath with you*. Upon that the other hung his head, and, considering the matter, said nothing for a good while, and then passed to other discourse. After that time he turned as fierce against *Oates* and his plot as ever, before, he had ranted for it, and thereby gave so great offence to their evidenceships the plot witnesses, that *Oates* and *Bedloe* accused him to the king and preferred formal articles of divers extravagancies and immoralities against him. The king appointed a hearing of the business in council, where *Scroggs* run down his accusers with much severity and wit, and the evidences fell short, so that, for want of proof, the petition and articles were dismissed. But for some jobs in the king's bench, as discharging a grand jury, &c. he had the honour to be impeached in parliament, of which nothing advanced. At last he died in *Essex-street* of a polypus in the heart. During his preferment he lived well and feathered his nest.

SERJEANT MAYNARD.

[From the Life of Lord Keeper Gaillard.]

MR. Serjeant *Maynard* had a mind to punish a man who had voted against his interest in a borough in the west, and brought an action against him for scandalous words spoke against him at a time when a member, to serve in the house of commons for that borough, was to be chosen. And, after his great skill, he first laid his action in the county of *Middlesex*: and that was by virtue of his privilege, which supposes a serjeant is attendant on the court of common pleas, and not to be drawn from the county where the court sat. And then in the next place he charged the words in *Latin*, that, if he proved the effect, it would be sufficient; whereas, being in *English*, they must prove the very words to a tittle; and were a long story that used to be told of Mr. *Noy* and all the cock lawyers of the west. And this was tried before his lordship at the *nisi prius* for the common pleas for *Middlesex*. The witness telling the story as he swore the defendant told it, said a client came to the serjeant and gave him a basket of pippins, and every pippin had a piece of gold in it. *Those were golden pippins*, quoth the judge. The serjeant began to puff, not bearing the jest, so the witness went on. And then, said he, the other side came and gave him a roasting pig, (as it is called in the west), and in the belly of that there were fifty broad pieces. *That's good sauce to a pig*, quoth the judge again. This put the serjeant out of all patience; and speaking to those about him, *This*, said he, *is on purpose to make me ridiculous*. This story being sworn, the judge directed the jury to find for the serjeant; but in the court the judgment was arrested, because the words were but a land story, and went as mere merriment over ale, without intent to slander. *Such bitterness flows from the sour spirits of old pretended republicans*. It had been well if no other instances but such

as this were extant to shew it. This happened when I attended; and so, know the matter to be, as above, literally true. But it is hard to believe that such a poor revenge could have been put into act by so great a man. And I should almost distrust myself if I had not been partaker of a more wretched come-off with the same person, which I shall relate, conceiving it to be full as material to shew little things of great men as great things of little men. One afternoon at the *nisi prius* court of the common pleas in *Westminster Hall*, before the judge sat, a poor half-starved old woman who sold sweetmeats to schoolboys and footmen, at the end of the bar, desired the serjeant to pay her two shillings for keeping his hat two terms. She spoke two or three times and he took no notice of her; and then I told the serjeant *the poor woman wanted her money*, and I thought he would *do well to pay her*. The serjeant fumbled a little, and then said to me, *lend me a shilling*. *Ay, with all my heart*, quoth I, *to pay the poor woman*. He took it and gave it her; but she asked for another. I said, *I would lend him that also to pay the woman*. *No, don't, boy*, said he, *for I never intend to pay you this*. And he was as good as his word; for, however he came off with that woman, having been, as they say, a wonderful charitable man, I am sure he died in my debt. But in this manner (as I guess he intended) I stood corrected for meddling.

This great man, as I must call him, since his natural and acquired abilities and the immense gains he had acquired by practice justly entitled his name to that epithet, was an anti-restauration lawyer. In 1684 I heard him say in the court of chancery, of a cause then at hearing, that he was counsel in that cause in the year 1643. His name is in *Crook's Reports*, in 3 *Car*. His actions, in the rebellious times, made the act of indemnity smell sweet. And, afterwards, he had the cunning to temporize, and get to be made the king's eldest serjeant; but advanced no farther. His lordship [lord *Guilford*] must needs have much conversation, as well as intercourse in business, with this eminent practiser in the law; but, as in other cases of adverse party-men, so, here, there could be no cordial friendship between them; but a fair and reasonable corre-

spondence there always was. The serjeant ever took in with proceedings that maligned his lordship; but he never outwent discretion so far as some did, to appear directly and nominally against him, which must have certainly rescinded all kind of correspondence. When his lordship sat in the chair of the common pleas he practised under him, and had always the respect due to his known abilities. But though the serjeant never failed to conform to all things required of him in public, as oaths, and tests, &c. yet for all that he continued a favourite in the *Presbyterian* congregations, and is at this day among them extolled as a saint, and his wonderful charities and other good works related: and, to give him his due, he was to his last breath, at the bottom, true as steel to the principles of the late times, when he first entered the stage of business. And whatever we that were frequently at his elbow knew of his saint-like administration of himself and his wealth, it is fit to be silent, because we should not speak ill of the dead. And, in that tendency, I shall only observe farther of him, that he practised before his lordship in all the king's courts where he sat as judge; and being an artful as well as learned lawyer, would lay notable snares; but, when discovered, never persisted but sat down; and, for the decorum of bar practice of the law was an excellent pattern and held a fair correspondence, and used a decent respect towards his lordship all his time.

THOMAS SYDERFIN, THE REPORTER.

[From the *Life of Lord Keeper Guilford.*]

THIS Mr. *Syderfin* was a *Somersetshire* gentleman, and proved a very good lawyer, as the book, two volumes in folio of reports of his shews. But he was not a better lawyer than a kind and good natured friend, having very good qualities under a rustic behaviour and more uncouth physiognomy. He used at the temple to be described by his hatchet

face and shoulder of mutton hand, and he walked splay, stooping and noddling. His lordship [lord keeper *Guilford*] used his conversation chiefly for his assistance in matters of law, wherein he was of great use and service to him. For when his multiplicity of active business would not allow him to consult in cases that he wished well to as well for friendship and relation as for fees, he usually substituted Mr. *Syderfin* to consult the books for him, as he himself had done before for sir *Jeffry Palmer*. And this leading the persons concerned to attend him by Mr. Attorney's direction, they, finding him industrious, learned, and careful, continued to use him as their immediate counsel in other smaller concerns, wherein Mr. Attorney was not concerned, which brought him into very considerable business, as well in conveyancing as at the bar. For his probity and exact justice to his clients was a great recommendation of him, for he had no tenters to hang their dependencies upon, to make them drop fat as some have had and done. But he died before his friend Mr. Attorney was made chief of the common pleas, else it is probable he might, by his means, have been taken into the wheel of preferment. The only thing which I ever heard him blamed for was the marrying a lady that was his ward before her minority was expired, which, by the world's allowance, makes her entirely capable* to dispose of herself. And it seems an ill use made of a trust and the authority of a guardian to take advantage of a minor's being a great fortune much above him, and anticipate her free choice by influencing her to marry him. But the lady had no cause to repent, for he was so good a man as could not but make her happy; and that, probably, young as she was, she was satisfied of by experience of his general behaviour towards her and others, which might make her determine so early. For she had a very good understanding, and had occasion to serve herself of all her thinking and judgment under an immense misfortune that befel her when she was a widow. For, being a great fortune, one *Sarsfield* ran away with her and carried her over into *France*, where, by the

* Qu? incapabla.

greatest accident, the abuse was discovered and the raptor seized, she protected, and both sent home; and the former, upon her most ingenious relation of the fact, sworn in a trial at the king's bench bar, convict and punished.

M. DE LOLME.

DIED lately (1807) in *Switzerland*, *M. De Lolme*, an eminent but rather eccentric writer. He died at an advanced age, and we are concerned to add, in indigent circumstances. His chief work was an *Essay on the English Constitution*, which deservedly possesses a high degree of reputation; besides this, he was the author of the *Flagellants*, a work which, whoever has not read, will find their time well employed in the perusal of it, and of a pamphlet on *Mr. Pitt's* window duty, one of the best political *jeu d'esprits* that we ever remember to have read. *M. De Lolme*, though a foreigner, wrote the *English* language with much purity and elegance. He was a native of *Switzerland*, and, in the early part of his life, one of the senators of *Geneva*.



THE
AMERICAN
Law Journal and Miscellaneous Repertory.
No. X.

PENNSYLVANIA COMMON PLEAS.

[In Pennsylvania, justices of the peace have no jurisdiction over a cause in which an executor or administrator is either plaintiff or defendant. Decision by *Bird Wilson*, Esq. president of the court of common pleas in the seventh district of the state of *Pennsylvania*. *Mary Coulter* administratrix v. *Tacy Jones*. *Certiorari* to *L. Young*, Esq. 1809.]

THE material exception to the proceedings of the justice in this cause is, that he had no jurisdiction; the plaintiff being an administratrix, and the acts of assembly giving no jurisdiction to justices of the peace where executors or administrators are plaintiffs or defendants.

The acts of assembly on this subject give to justices jurisdiction over certain causes of action in very general terms, without expressly excepting any description of persons from it; and if the question before us depended only on the construction of those parts of the acts by which the jurisdiction is confirmed, they would clearly include the cases in which executors or administrators are parties, as well as others. But the intention of the legislature^(a) is not to be sought for in that manner; we must discover it by an examination and comparison of the provisions of the *whole law*, and the intention thus discovered will limit the extent of the general expressions, and in any *particular part* of the law. Now, from the whole tenor of these acts of assembly it appears manifest, that the legislature had in view only parties appearing before the

(a) 2 Cranch 52.

justices in their own right, and not as the representatives of persons deceased; and that difficulties and embarrassments, which seem insurmountable, will be met with in every step of the proceedings to which such representatives are made parties. A review of the course of proceedings directed by the acts will shew this clearly. They are all founded on the idea of *personal responsibility*.

The process to bring in the defendant is directed to be a summons, if he is a freeholder, and if not, a warrant of arrest, without regard to the character in which he is sued. A subsequent act authorises the issuing of a summons against a defendant who is not a freeholder: but that is at the election of the plaintiff.

The judgment that is given is viewed by the acts as operating against the defendant personally, and the transcript of it when filed in the common pleas is made to bind the real estates; still continuing the idea, that the defendant against whom it is given is responsible individually, in his person and property, for the payment. Judgment could not be against him, *de bonis testatoris*.

The stay of execution upon the judgment is to be granted only if the defendant is a freeholder, or shall enter special bail to the action. If an executor can be defendant, there is an absurdity in making the stay of execution depend on a circumstance which cannot at all affect the security of the debt; that is, that the executor himself is a freeholder. Nor can it be believed, that the legislature designed to make it necessary for an executor, in order to prevent a stay of execution, to subject his own person to imprisonment by entering bail who might surrender him.

A similar difficulty occurs with relation to the appeal. The appellant must give bail, and the condition of the recognisance is, that he shall prosecute his appeal with effect, or that the bail shall pay the debt and costs or surrender him to prison. Again, making it necessary for an executor, if he is within the law, to incur a personal responsibility for the debt, in order to give the estate of his testator the advantage of an appeal, would frequently prevent the appeal, and occasion

much injustice, because such a responsibility would not often be assumed.

In fine, the execution by which the judgment is to be carried into effect contemplates the defendant as *personally responsible*. The form of it is prescribed; and when a form of process is prescribed, an inferior jurisdiction has not the power of varying from it.^(b) The execution is to command the constable to levy the debt or damages and costs of the *defendant's goods and chattels*, and for want of sufficient distress, to take *his body* and convey him to jail. An execution cannot be issued against him, directing the debt to be levied of the goods of the testator. "In short," to use the language of the supreme court of *New York*, on a similar question "all the rights of an executor at common law would be invaded if subject to the proceedings under this statute."^(c)

There are other reasons, besides those drawn from the course of proceedings directed by the act, which strengthen the conclusion that executors and administrators were not intended by the legislature to be affected by it. If they are within it, justices of the peace will be empowered, from the nature of the questions which frequently arise in suits against executors and administrators, to decide incidentally upon property to a much greater amount, and upon questions more difficult and complicated than the legislature contemplated. The plea of *plene administravit* might render an investigation of their whole administration accounts necessary. The plea of *debts of a higher nature* might lead to equal difficulty. Perhaps, therefore, if the subject was directly brought within the view of the legislature they would not confer this jurisdiction; or if they did, would make new provisions to prevent the inconveniences suggested, and to give the justices better means than they now possess to enable them to decide correctly.

The difficulties which I have stated do not apply only to cases in which executors are defendants. With regard to the appeal, an executor plaintiff is subject to equal difficulty. And also, as the defendant may have a set-off which he may make

(b) 3 Mass. T. Rep. 195. 197.

(c) 1 Johns. Cas. 228.

against the claim of the executor, and which, indeed, the law compels him to make if it does not exceed one hundred dollars, the balance may by that means be against the executor, who will thus be converted into a defendant. Though this may not occur very frequently, the argument against the authority of the justice is not weakened; as the right of the parties may be presented in such a way that he may be incompetent to decide upon them; and when that may be the case, he ought to exercise no jurisdiction over the cause.

A question similar to this came before the court of *king's bench* in the case of *Aliway v. Burrows, ex. (Doug. 263.)*(d) It was whether the court of conscience had jurisdiction in a case against an executor. The jurisdiction of that court was given in general terms, without any such exception being made. But lord *Mansfield* said, "it could not be meant to give this court of conscience a jurisdiction over executors. If there is no express exception, there is one implied from the nature and reason of the thing." In that case the executor was defendant.

But the case of *Wilks v. Newkirk*, decided in the supreme court of *New York* upon the construction of a statute of that state very similar to our acts of assembly relating to the jurisdiction of justices of the peace in all the particulars which can affect the decision of the present question, was the case of an executor plaintiff, and corresponds exactly with the case before us. It is reported in 1 *Johns. Cases*, 228. The opinion of that court was that the justices' courts had no jurisdiction except where the parties acted in their own right and did not appear *in autre droit*, though their jurisdiction was conferred in general terms, without any exception as to the character of the parties. That opinion is supported by the same course of reasoning (in general) that I have pursued in this case.

The legislature of that state were sensible of the weight of the reasons on which their supreme court had decided: and in a subsequent revision of their statute, introduced an express exception of suits *against* executors and administrators, but

were silent as to suits in their favor. But it was still held in the case of *Way v. Carey*, 1 *Caines*, 191., that the justices' courts had no jurisdiction where executors were plaintiffs, because such a jurisdiction could not be admitted by inference or implication.

Upon principle then, supported by these respectable opinions, I think that the justices of the peace have no jurisdiction over a cause in which an executor or administrator is either plaintiff or defendant. Consequently the judgment must be reversed.

Judgment reversed.

NORTH CAROLINA.

Bertie Superior Court, Fall Term, 1803.

Flury *versus* Nalts.

THE sloop *Julia* was owned by Nalts of *New-York* and comimanded by *Hicks*, who contracted with the plaintiff at *Edenton* to take a cargo on his account from that port to the island of *Barbadoes*, there to dispose of it to the best advantage, and deliver the proceeds to the plaintiff's agent at *New-York*.

The vessel arrived in safety at *Barbadoes*, where the captain sold the whole of the cargo, and received one fourth of the price in cash and the residue in the produce of the island, a part of which was shipped on board the sloop for the return voyage, and consigned by the captain to the agent of the plaintiff; but no part thereof was ever received by *Flury*.

The cargo was consigned exclusively to the captain. It appeared in evidence that the sloop had been insured at *New-York* as a coasting vessel for six months, and that she sailed under a coasting license to *Edenton*. But upon the questions whether the captain was authorised by the owners to receive freight on a foreign voyage, and whether the want of such authority was known to the plaintiff, there was a diversity of evidence; and the law of the case principally arose from the facts first above stated. After an ample discussion at the bar, the following opinion was delivered by the court:

That the owners are answerable for a breach of those contracts which the captain enters into relative to the usual employment of the vessel, is a general principle of law, not less fortified by authority than recommended by the clearest maxims of justice and policy.

From such employment the owners derive profit, and with the best means of forming a just estimate of the integrity and skill of the captain, they announce to the public by the very act of appointing him to that station, that such contracts as are usually made with captains may safely be made with him. If in consequence of the misconduct of the captain an injury results to the owners, it is occasioned by their negligence or mistake in the appointment. Is it not therefore right that the mischievous effects of the act of their agent should press upon them rather than upon innocent strangers, who have been induced to repose their confidence by the recommendation of the owners? To define, however, the extent of the owner's responsibility, it is necessary to attend to this circumstance, that a captain is an agent with a circumscribed authority, and can only bind his principal while he acts within the limits of his power. If he enter into contracts which have no relation to his duty under the owners, the party must look to him alone for their fulfilment; for the owners are no more liable than they would be for an assault or felony committed by him at sea. A material fact in the case is, that the plaintiff appointed the captain consignee of the cargo. He thus acquired a power and control over the plaintiff's property, which could not have been derived from his duty or rights as commander of the vessel. By this means he became the agent of the plaintiff in relation to the property, when he ceased to be the agent of the owners. They recommend him only as a person qualified by his nautical knowledge and experience to manage and conduct the ship, and by his fidelity to take care of, and deliver to order, the lading put on board. Knowing that they must indemnify the shipper for all injuries arising from the master's deficiency in these points, they will necessarily exercise the utmost caution in the choice. But the capacity to command a ship does not imply the requisite qualifications for a consignee; and an owner without diffiding in the integrity of his captain might yet be reluctant to engage for his dexterity in this new character. From these principles it seems to me to follow, that the owners are liable only for the amount of property shipped on board their vessel on the homeward voyage, whe-

ther it consist of money or produce. That for the money received, or the proportion of cargo sold in the *West Indies*, the proceeds of which were not shipped, the plaintiff can resort only to the captain, whom they thought fit to invest with a special agency in the entire management of their affairs.

Another objection made to the plaintiff's recovery is, that the sloop was employed only in the coasting trade, and that the master in taking a cargo for a foreign voyage exceeded his powers, and therefore cannot bind the owners. That the sloop was insured as a coasting vessel is evident, but it is not so clear that the captain was not authorised to receive a foreign freight if an advantageous offer were made him. It is true that he told the plaintiff on one occasion that the sloop was not at liberty to leave the *United States*; but it is also proved that he said, upon another, that if he could not procure freight for the northward he was at liberty to go to the *West Indies*. These sayings are not easily reconciled, but the fact itself must be collected from all the circumstances of the case; to which it may be added that it is proved to be a customary trade for vessels to come from the northern and eastern states with coasting licenses and take freight to the *West Indies*. It also appears in proof, that the owners insured for the *West Indies* as soon as they received *Hicks'* letter informing them of the charter-party. To the state of facts once ascertained, there would be no difficulty in applying the law, of which the rule is, that the owners are liable for the contracts of the master if his situation furnishes the presumption of authority for making them. In such case, though he contravene the orders of the owners, they are still liable, unless the party with whom he contracts is made acquainted with the orders by which his power is limited.

Verdict for the plaintiff 1800 dollars.

[From the New-York Gazette.]

District Court. New-York District.

United States versus Edward Price.

AT the district court of the *United States*, held before his honour Judge *Talmadge*, which commenced its sessions on the fourth instant, several of those suits which have been instituted to recover penalties under the embargo laws were noticed for trial. Among others the cause of the *United States* against *Edward Price*, which was an action of debt to recover against him, as master, or person having charge of the schooner *Regulator*, or as being knowingly concerned in the lading of the said vessel, penalties for loading in the night time without a permit and without the inspection of the proper revenue officer.

A great part of the jury which appeared to serve at this court were from *Orange*, a county fifty or sixty miles from the city, from whence they had been summoned by the marshal without any official direction of the judge, and were selected by the mere will of the marshal, without any attempt having been made to conform to the mode of forming juries in the courts of this state.

By the judiciary act of the *United States*, passed in 1789, it is enacted, "that jurors in all cases to serve in the courts of the *United States* shall be designated by lot or otherwise in each state respectively, according to the mode of forming juries therein then practised, so far as the laws of the same should render such designations practicable by the courts of marshals of the *United States*; and that the jurors should have the same qualifications as are requisite for jurors by laws of

- the state of which they are citizens, to serve in the highest courts of law of such state, and should be returned as there should be occasion for them from such parts of the district from time to time as the court should direct, so as should be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services."

This law as to the mode in which jurors were to be designated refers to the time when it was passed, but alterations having been afterwards made in the mode of selecting jurors in several of the states, and particularly in our state by an act which provided that jurors in this state should be selected by ballot from a list annually returned to the clerk's office of every county, by certain persons designated in the law; congress, in May 1800, passed a law, which, so far as relates to the mode of selecting jurors, is nearly in the words of the law of 1789, and declares that jurors to serve in the courts of the *United States* shall be designated by lot, or otherwise in each state or district respectively according to the mode of forming juries to serve in the highest courts of law therein, then practised, so far as the same shall render such designation practicable by the courts or marshals of the *United States*. But the *United States*' law of 1789, so far as it relates to the courts directing from what part of the district the jury shall be taken, remains unaltered.

On *Tuesday* last, the district attorney moved to bring on the trial of the abovementioned cause, when Mr. *Griffin* and Mr. *Colden*, who were of counsel for the defendant, filed a challenge to the array, alleging that the jurors were not legally returned, because they had been summoned by the marshal of his mere arbitrary will; that they had not been returned from a part of the district directed by the court. To this challenge the attorney of the *United States* demurred *ore tenus*; that is to say, he made a parol declaration that no legal objections to the jury were shewn by the defendant's challenge. The counsel for the defendant insisted that the attorney of the *United States* ought to be compelled to put his demurrer in writing, but the court determined, that a parol demurrer was

sufficient, and the court also decided that the attorneys might immediately proceed to argue on the demurrer whether there was cause of challenge, which they accordingly did. The attorney of the *United States* contended that it was impracticable to select the jury by ballot as was practised by the courts in this state, or in anywise to conform to the state laws in this respect; that the part of the *United States* law which provides for the jurors being returned from such part of the state as should be directed by the judge, was a provision merely intended for the ease and convenience of jurors, and gave the parties no rights; besides, that though the act of congress authorised the court to direct from whence the jury was to come, this authority was only to be exercised on application of the party who desired it to be executed, and the defendant having made no application to the court, he was not to be allowed to make the want of its direction an objection to the jury; and lastly, the attorney of the *United States* insisted that the jury had been summoned according to what had been the practice of the court from its institution.

The counsel for the defendant insisted that as the attorney of the *United States* had demurred to the challenge, and took no exception to its form, he admitted the facts. He had admitted therefore that the jurors had not been elected by ballot according to the state laws as far as was practicable, and that they had not been summoned from a part of the district directed by the court; that therefore the only inquiry was, whether the laws of congress required that these things should be done, and the defendant had nothing to do but appeal to the statute book; that if the attorney relied on the impracticability of conforming to the practice under the state laws, he ought to have pleaded to the challenge, or have moved to quash it: but as the court had decided that it was now proper to discuss the points which the attorney had been permitted to state, the defendant's counsel would, in behalf of the defendant, answer the arguments which had been offered by counsel for the plaintiffs. The defendant's counsel then proceeded to state that as to the manner of electing the jury, it was to be observed, that the act of congress did not require a full compliance

with the state laws; that the great object was to preserve to suitors in the courts of the *United States*, as far as was practicable, the invaluable right of having the jurors elected by ballot, and that this was by no means impracticable; that in every clerk's office in the state, there was a book containing the names of the freeholders in the county qualified to serve on juries; that the judge might have directed from what county the jury should have been summoned that the marshal might have applied to the clerk of that county for a copy of his list of freeholders; from that list he might have made his ballots, and he might have balloted for the panel in the presence of the judge or the clerk of this court, which would have been a very near approximation to the mode of electing jurors for the state courts; or the marshal, with the assistance of his deputies, might have made a list of freeholders in any part of the district that the court might have designated, and then there would have been no difficulty in making the ballot. But at any rate, no sufficient reason had been offered for the neglect of part of the act which requires the court to direct from what place the jury should be taken. The terms of the law of congress left no discretion with the court in this respect. The words of the statute are not that the court *may*, but that the court *shall* direct from what part of the district the jurors shall be returned. That it was absurd to say, that the defendant in such cause was to apply for the direction of the court because jurors were summoned to try all the causes which might be brought on at a sittings; and if such an application was to be attended to from each defendant there might be as many panels returned as there were causes. That the defendant might not have had an opportunity of making such an application; for that the process to summon the jury might have been issued and executed before he received notice that his cause was to be tried. Besides, that it was a general principle, that the plaintiff must take care that the jurors that appeared, as well in respect to the manner of their being chosen as to their qualifications, were proper to try his cause, and if they were not, the defendant might take advantage of it, as was every day's practice for defendant to do. As to the former practice of the

court, the defendant's counsel observed, that that ought to have no influence on his honour's decision, because it was well known that until very lately the causes which were submitted to a jury in this court were very few and comparatively of very little consequence, and were seldom of a nature to excite any fears that the jury might have a bias to the one side or the other. That therefore the manner in which jurors had been selected had never excited any attention; but at this time the case was very different, for it was not an exaggeration to say that there were now millions depending on the event of suits which had been instituted for breaches of the embargo laws. That it was well known that libels were now upon the records of the court which proceed upon the ground that the president's proclamation of the 19th *April* last opening the intercourse with *Great Britain* was an illegal act, that he had no authority to issue it, that therefore it was a mere nullity, and that of course, the nonintercourse act of the 1st of *March*, with all its denunciations of penalties and forfeitures, had always been in full force. That if the courts were to be of this opinion, there was hardly a merchant in the *United States* who was not at the mercy of the executive officers of the government, who might not have their property seized, and who might not be prosecuted in suits of this nature for enormous penalties. It became therefore now of the utmost importance to see that all the cautions which the laws had provided for an impartial selection of jurors should be observed. That the questions between the government and the citizens which were to be decided in this court under the embargo laws it was well known had greatly excited the public mind. It would hardly be denied that many might be found in the district who were so blinded by their political prejudices and by their passions, that they would never acquit a political opponent accused of a breach of the embargo laws, which were so dear to those who favour them; at the same time it was not meant to be denied, but that men might also be found as prejudiced against convicting.

If then a marshal might run from one end of his district to the other to select just whom he pleased for trials of this na-

ture, it was in fact putting it in the power of an individual to determine who should be convicted, and who acquitted in the courts of the *United States*.

The counsel of the defendant called the attention of the court to the constitution of the *United States* and its amendments. The first provided that the trial of all crimes shall be by jury. But it being feared that this *inestimable right* was not sufficiently guarded by this simple provision, the seventh article of the amendments provides, that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an *impartial jury*. The counsel then asked whether it was possible to suppose, that the framers of the constitution or of its amendments could have imagined, that notwithstanding the provisions, a citizen might be subject to trial for his life, even by a jury selected at the mere will of a marshal who might be his prejudiced political opponent or his bitterest enemy. Had a defendant, the counsel asked, any security for an impartial jury in cases like this, where the jurors may be selected at the mere will of an officer holding his commission at the pleasure of the officer of the government, at whose instigation the suit is instituted, and who has an eventual pecuniary interest in the conviction of the defendant; for if the penalties which are demanded in these cases are to be levied on execution, the marshal's share of them will be no inconsiderable fortune. The counsel for the defendant both declared, that the attempt they made in this case was merely with a view to secure to suitors in this court the benefits of those provisions of the state laws which were so well calculated to guard against corruption and partiality, and which perhaps was a greater improvement in jurisprudence, than the institution of trial by jury itself. That in what they had said respecting the marshal and jurors, they referred entirely to what might be, without intending any insinuation as to what was or had been. That as to the present marshal, they had never heard any thing to his prejudice, and they did not know any thing of the jurors, from a distant part of the district, who were on the panel.

When the *United States'* attorney had said a few words in reply to the arguments of the defendant's counsel, the judge told him it was unnecessary for him to proceed, as the court was satisfied on the subject.

We shall not attempt to detail the reasons his honour gave for his decision, for fear of mistakes. He however exactly agreed with the attorney of the *United States* in all points. He thought it was wholly impracticable to have any ballot or to conform in any respect to the state laws. That it was discretionary with the court to give or not, at its pleasure, any direction as to the summoning the jury; and that if a defendant was desirous that a direction should be given, it was his business to apply for it. And the judge ordered the clerk to enter on the minutes the demurrer of the attorney of the *United States*, and that upon hearing counsel thereupon, the court gave judgment in favour of the *United States*.

So that, according to the decision, the marshal of the *United States* in all cases, whether civil or criminal, whether the life or property of a defendant is concerned, or whether the defendant be his friend or enemy, has an uncontrollable power of selecting whom he pleases for jurors.

It would really seem a little difficult to reconcile the entries which appear on the records of the court with the provisions of the constitution and laws of the *United States*. The laws require that the jurors shall be selected as far as is practicable by ballot, and that they shall be taken from a part of the district designated by the court. The defendant alleges by his challenge, that neither of these provisions have been complied with. The attorney of the *United States* by his demurrer admits these allegations to be true, *and yet* the judgment of the court is that the jury have been legally summoned.

District Court. Maryland District.

United States versus Barney.

WINCHESTER, J. The indictment in this case, which charges the defendant with having wilfully obstructed the passage of the public mail at *Susquehanna* river, is founded on the act of congress of *March 1799*.

The defendant sets up as a defence and justification of this obstruction of the mail, that he had fed the horses employed in carrying the mail for a considerable time, and that a sum of money was due to him for food furnished at and before the time of their arrest and detention.

On this state of the facts, two questions have been agitated.

1st, Whether the right of an innkeeper to detain a horse for his food extends to horses owned by individuals and employed in the transportation of the public mail. And,

2d, Whether such right extends to horses belonging to the *United States*, employed in that service.

The first question involves the consideration of principles of some extent, and to decide correctly on the second, it may be necessary to state them generally.

Lien is generally defined to be a tie, hold or security upon goods or other things which a man has in his custody, till he is paid what is due to him. From this definition it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud. 2 *Fern.* 117. 1 *Atk.* 234.

The claim of a lien otherwise well founded cannot be supported, if there is

1st, A particular agreement made and relied on. *Sayer's Rep.* 224. 2 *R. A.* 92. Or,

2dly. Where the particular transaction shews that there was no intention that there should be a lien, but some *other security is looked to and relied upon.* 4 Burr. 2223.

If, therefore, in this case, the agreement between the defendant and the public agent actually was that he should be paid for feeding the public horses on as low terms as any other person on the road would supply them, he could not justify detaining the horses; for the particular agreement thus made, and under which the food was furnished, is the foundation of the remedy of the defendant, and it can be pursued in no other manner than upon that agreement. Or if there was no particular agreement, this case is such, that between the defendant and a private owner of horses and carriages employed in transporting the mail, I incline to think it could not legally be presumed a lien was ever intended or contemplated. A carrier of the mail is bound not to delay its delivery, under severe penalties, and it can scarcely be supposed that he would expose himself to the penalty for such delay, by leaving his horses subject to the arrest of every innkeeper on the road for their food, or that in such case the innkeeper could look to any other security than the personal credit of the owner of the horses for reimbursement. But the law on such a case could be only declared on facts admitted by the parties or found by the jury, and is not now before the court.

3dly. The great question in this case rests on a discrimination between the property of the government and individuals.

To the government is granted by the constitution the general power to lay and collect taxes, duties, imposts, and excise, to pay the debts, and provide for the common defence and general welfare of the *United States*:

To raise and support armies:

To provide and maintain a navy:

To establish post-offices and post-roads:

And to make all laws which shall be necessary and proper for carrying these and all other constitutional powers into effect.

The public money can never be drawn out of the treasury unless with the consent of the legislature; but whenever a debt is contracted in the establishment of a post-office, or road, or in the support of an army, or in the provision for raising or supporting a navy, or any other measure of general welfare, the public faith and credit is pledged for its payment. On the public faith and credit advances are made to the government, relying on the constitutional mode of reimbursement. If it were otherwise, what dreadful consequences would not result?

A shipcarpenter might libel public ships.

A quarter-master retain the supplies of the army. Or,

An innkeeper stop the progress of an army for food to horses of a baggage wagon.

Every man must surely deprecate a state of society where no immunity to the government shall be afforded by the constitution against such evils. Happily we are not so exposed. Congress only have the power, and they are bound by the most sacred ties of moral obligation and duty to provide for the payment of the public debts.

No other remedy exists for a creditor of the government than an application to congress for payment.

A lien cannot be permitted to exist against the government: for liens are only known or admitted in cases where the relation of debtor and creditor exists so as to maintain a suit at law for the debt or duty which gives rise to a lien, in case the pledge be destroyed or the possession thereof lost. As in the case of a carrier of the mail: he cannot sue for the hire nor retain the mail, because he cannot sue. Yet a carrier of private property may sue or retain, because government is not answerable. Justice is the same whether due from one to a million or a million to one man; but the mode of obtaining that justice must vary. An individual may sue and be sued. The *United States* cannot be sued. Suability is incompatible with the idea of sovereign power. The adversary proceedings of a court of judicature can never be admitted against an independent government, or the public stock or property. The ties of faith, public character, and constitutional duty, are the sure

pledges of public integrity, and to them the public creditors must, and I trust with confidence, may, look for justice. They must not measure it out for themselves. I have stated these principles to shew, that by law the defendant could not justify stopping the mail, on principles of common law, as they apply to individuals and to the government.

There are however considerations arising from the act of congress which are conclusive to my mind.

The statute is a general prohibitory act. The common law, if opposed, must give way to it, and the court is bound to decide according to the correct construction of that law. That the act is constitutional is not, nor indeed can be questioned. It has introduced no exception. Whether the acts which it prohibits to be done were lawful or unlawful before the operation of that law, or independent of it, might or might not be justified, is not material. This law does not allow any justification of a *wilful and voluntary act* of obstruction to the passage of the mail. If therefore courts or juries were to introduce exceptions not found in the law itself, by admitting justifications for the breach of the act, which justifications the act does not allow to be made, it would be an assumption of legislative power. Many exceptions might be introduced, and perhaps with propriety. For instance,

A stolen horse found in the mail stage. The owner cannot seize him.

The driver being in debt, or even committing an offence, can only be arrested in such way as does not obstruct the passage of the mail.

These examples are as strong as any which are likely to occur, but even these are not excepted by the statute, and probably considerations of the extreme importance to the government and individuals of the regular transmission of public despatches and private communications may have excluded these exceptions. But whatever may have been the policy which led to the adoption of the law, which the court will not inquire into, it totally prohibits any obstruction to the passage of the mail. It is the duty of the court to expound and execute the

law, and therefore I am of opinion and decide that the defendant is not justified.

*Case of the Deserters from the British frigate
L'Africaine.*

THE case of the deserters from the *British frigate L'Africaine*, now lying at *Annapolis*, has excited much attention, and we have been requested by several correspondents to give a full account of it, with the arguments of counsel and the decision of the judge at length. We shall detail the circumstances; but no arguments were employed on the subject.

In the case of *Hippolyte Dumas*, judge *Tilghman*, whose opinion is reported in a former number of this Journal,^(e) avoided the question of delivering up deserters from the ships of those nations which are willing to surrender persons in similar cases. The point did not come before him, and he very properly avoided an extra judicial decision to which his reputation would have given great weight. It is true that there exists no law of the *United States* on this subject; but we hold that,

1. The law of nations is the law of the land.
2. That all judicial tribunals, exercising common law jurisdiction, are bound to carry into effect the laws of nations.
3. That the law of nations requires the delivery of deserters from the ships of war belonging to a nation at peace with that country in whose ports the persons have deserted and taken refuge.

That the law of nations is the law of the land, requires no demonstration.

In all questions respecting the laws of nations, it is the fashion to go back to what is called a state of nature. We are

(e) Vol. 2. p. 86. and see vol. 1. p. 376.

willing to admit that there was a time when men ran wild, and even, according to Lord *Monboddo*, that they had tails. In such a state, then, if one person trod upon the tail of another, the insult must have been redressed by the party injured. But when civil society was instituted, a tribunal was organized for the punishment of offences, and the individual surrendered his right of revenge. It became the duty of government to protect the community from internal commotion and external violence. Now it is difficult to imagine a case more likely to produce injury than the protection of deserters or fugitives from another country. The country which harbours them is injured by the introduction of corruption into its body, and it is further injured by the resentment or the contempt which such conduct will meet in the opinion of contemporary nations. Hence the rigorous manner in which they were treated by the *Roman law*. *We allow persons in every province full power and right to distress deserters. If they shall dare to resist, we command their punishment to be expeditious, wherever they are found. Let all men know they are hereby invested with a right to act in the name of the public against public robbers, and those who desert from the army; and that this right is to be employed for the peace of the commonwealth.* *Cod. Lib. 111. tit. 27.* He who deserts his colours, who basely shrinks from the honourable duty of defending his country, forfeits all right of protection from any country. *Grotius* says expressly he ought to be punished where he takes refuge, or be delivered up. *B. 11. ch. xx. § 4. 1.* and he cites a variety of instances where fugitives have been surrendered. "By the law of war," he says, "we receive deserters," (*B. 111. ch. xx. § 12. 1.*) and *è converso*, we may infer, that in time of peace no such right exists. *Galiano*, in his treatise on the mutual rights and duties of belligerents and neutrals, contends for the same equitable law.

But it seems the secretary of state informed Mr. *Erskine* that the *executive* of the *United States* had no power to deliver up deserters, because no such prerogative was vested in the executive, and that neither the law nor the practice of nations imposed such an obligation on them. And as the *executive* had no such power, the chief justice concluded that it was not

vested in the *judiciary*. As to the prerogative of the executive, the history of the last administration affords ample and lamentable proof that it was easy to be found when it was wanted. As to the silence of our laws on the subject, it is no argument. Where is the law to authorise me to recover on a bond for money lent? What authorises the arrest and trial of a thief? How can a conspiracy to raise wages be punished? In the trial of judge *Chase*, Mr. *Rodney*, the present attorney-general of the *United States*, supposed the case of a judge ordering a trial by eleven jurors instead of twelve, and said "he knew of no law which would be violated."^(f) And yet no one even supposed that such a law did not exist because Mr. *Rodney* was ignorant of it.

That the practice of nations is not as stated by the secretary of state, will fully appear by reference to the notes on those parts of *Grotius* which we have cited, and the text we take as better evidence of what is the law of nations than the opinion of Mr. *Madison*.

We therefore conclude that the policy of nations, and the rights of hospitality, require the surrender of deserters. Such a law is a natural consequence of the constitution of civil society, and a fair application of the law of nature to that constitution. And they should be surrendered by the judiciary. A consul has no right to apprehend a deserter in another country. No man can be arrested but by a legal warrant, and no warrant can be legal unless it be issued by a judicial tribunal.

September 8th, 1809.

The prisoners were brought before *John Scott*, esq. chief justice of the court of *oyer and terminer*, at 9 o'clock, A. M. on a *habeas corpus ad subjiciendum*. The sheriff returned that they were detained by virtue of a written order to that effect from *William Wood*, esq. the *British* consul, stating that they were deserters from his *Britannic* majesty's armed vessel *L'Africaine*. The deserters were arrested on the night of the 7th inst. Mr. *Wood* was requested to attend the chief justice the next morning.

(f) *Chase's Trial*, p. 245.

When he appeared, he named two gentlemen of the bar whom he wished to consult; but the counsel for the prisoners insisted upon their immediate discharge. They urged that, even admitting the prisoners to be deserters from a *British* vessel and *British* subjects, they could not be legally arrested and detained. But the chief justice sent for the gentlemen named, and one of them, Mr. *W. Dorsey*, shortly after appeared in court. He stated that this was the first intimation he had received; that the case was novel and of great importance, and that being then engaged in a cause in the district court, he begged the counsel for the consul might be heard in the afternoon. He added that the *habeas corpus* had been granted without any affidavit of the legal confinement of the prisoners, and that he understood objections were made to the legality of the order under which the arrest had been made: and that as the judge had full power to inquire into the case and discharge entirely or upon bail, or recommit the persons, he hoped a short delay might be granted, in order that the case might be investigated.

But the chief justice said the writ and return were now before him, and he must decide on the sufficiency of the latter.

In giving his opinion, he "stated it was bottomed on an act of congress passed 20th *July*, 1790, ch. 29, which makes it lawful for any justice of the peace within the *United States* to issue his warrant to apprehend any deserter who had signed a contract at any port or place, within the *United States*, to perform a voyage, but no other deserter, and that he was strengthened in this opinion by a letter of the late secretary of state,^(g) and that he had no power to apprehend any other de-

(g) I do not know whether this letter has ever been published. The judge referred to the *National Intelligencer* of 29th *July* 1807, in which the editor has inserted the following note to a statement of the correspondence of the hon. Mr. *Erskine* and the secretary of state, respecting the surrender of the deserters from the *Chesapeake*.

"This answer was written *January* 7, 1807. It was produced by an application for the surrender to their allegiance of certain *British* seamen, who having united with *American* seamen left on board a vessel ordered to *Hali-*

serter, than one who had thus signed shipping articles. The judge stated at the same time that *the British consul had a right to take up any person deserting from a British vessel*, and that he never would interfere to prevent it, unless it should be proved to him that the person deserting was an impressed *American* seaman.

- We have received this additional information from the judge himself, as to the reasons which influenced his decision. We shall only remark for the present *that the deserters were apprehended under the authority and by a written order from the British consul*. The sheriff who took them up did not lodge them in gaol, as though he was authorised so to do by the judges of the court of oyer and terminer, or any other court, but merely for safe keeping. The court by discharging them virtually decided that they could not be arrested and held under the written order of the *British* consul. The men have been released, and it is useless now to attempt to apprehend them. They would be rescued by a mob; acting under the impression that the law was on their side.”(h)

fax as a prize, brought her into the *United States*, and were charged with mutiny, piracy, and an attempt to murder their officers. The answer stated, that not only no prerogative for the purpose in question is vested in the executive of the *United States*, but that neither the law nor the practice of nations imposes on them an obligation to provide for the surrender of fugitives from the jurisdiction of other powers. The obligation can result only from special and mutual stipulations, which do not exist between the *United States* and *Great Britain*, and which, indeed, as limited in the expired articles of the treaty of 1794, do not comprehend any other offences than those of actual murder and forgery.”

(h) *Federal Republican*, 14th September, 1809.

BRITISH COURT OF SESSIONS,

JUNE, 1806.

Thompson *versus* Millie.

[SEAMEN'S WAGES. Wages are due to a mariner during the time that the vessel is detained in a foreign port by an embargo. The reader will find a case precisely similar to this, very fully argued, in 3 *Bos. & Pul*, 432.]

ROBERT THOMPSON was hired to perform a voyage to *Russia* and back again, on board the *Resolution*, belonging to *David Millie*, at a certain rate per month. The ship having finished her voyage out, was lying in the harbour of *Petersburgh*, when the emperor *Paul*, taking umbrage at an alleged delay of *Great Britain* in the execution of a treaty, published a proclamation (7th of *November*, 1800) which declares that "his imperial majesty being determined to defend his rights, has been pleased to command that an embargo shall be laid on all *English* ships in the ports of his empire till the abovementioned convention shall be fulfilled."

The sailors were marched into the interior of the country, under a *Russian* guard, and there detained as prisoners. Commissioners were appointed for the disposing of the *British* effects which had been sequestered, and for receiving the balances of all accounts.

A hostile confederacy was formed between *Russia*, *Sweden*, and *Denmark*, which was dissolved by the battle of *Copenhagen*, *April* 2d, 180 , and the death of the emperor *Paul*. In the month of *May* the *British* seamen were marched back to the coast, and, along with their vessels and cargoes, were

liberated; but no indemnification was made by the *Russian* government, either to the proprietors of the ships, for the loss they had sustained on account of the detention of their ships and cargoes; nor to their sailors on account of their captivity.

Millie refused to pay the wages for the time during which the vessel had been detained, as during that time *Thompson* had not been aboard the ship, nor employed on the service.

Thompson, therefore, brought an action against him before the judge admiral, concluding for "the sum of 31*l.* 13*s.* 4*d.* of wages, for the purser's service on board the ship *Resolution*, from the 8th of *November* 1800, to the 30th of *May* 1801."

The judge admiral, 8th *June* 1804, decided against the defendant.

The case having been brought before the court, the Lord Ordinary, (6th of *June* 1806) repelled the reasons of suspensions and reduction.

Millie reclaimed, and

Pleaded—It is admitted, that if the seizure of the ship by the *Russians* be considered as a capture, that there can be no claim for wages to the mariners during the period of detention. Now, this truly was a hostile seizure, both from the treatment which the seamen received and by the measures which were adopted in regard to the ship and cargo. All connexion between the sailors and the ships on board which they sailed, were dissolved. They were no longer in the service of their owners; they were actually prisoners. There was a complete interruption of the service, and consequently of the contract. An embargo is, where an order is given to prevent ships from sailing from particular ports, or to any particular country for a certain definitive space of time. The ship in that case remains the property of the owners, in every respect, and the sailors remain to their service. But the proceeding in this instance was totally different; and the measures adopted by the *British* government as reprisals, on account of the *Russian* embargo, have been held to partake as much of the nature of hostility, as to discharge the contract of charter-party between the subjects of those powers and *Great Britain*, and to put an end to the lien which the master has over the cargo for his

freight. It cannot, therefore, subsist between the shipowner and the mariners.

Answer. When a vessel is captured or totally lost, before reaching the port of its destination, the sailor loses all right to his wages; but wherever freight is earned wages are due, without taking the accidents or impediments which may have shortened or protracted the voyage; whether it has been from contrary winds, from being becalmed, from being detained by frost, or by the embargo of a foreign prince. In this case, there never was any thing more than an embargo; the ship never was condemned, nor the property confiscated. There was nothing but the act of detention; every thing that followed was subservient to that act, and intended for no other purpose than to make it effectual. After subsisting a few months, the embargo was regularly taken off; the property was restored, without having been for a moment divested, and the vessel proceeded upon its voyage without any new contract, either express or implied, and earned the stipulated freight, upon safely landing the cargo in this country. A case in point has been already decided in the *English* courts, *Beal v. Thompson*, in *Bos. & Pull. Rep.* vol. 3. p. 432.

THE COURT considered, that, although the proceedings of the *Russian* court were attended with greater acts of hostility than usual; yet, upon the whole, they bore more the appearance of an embargo than a capture; and, consequently, that they did not void the contract, by which the sailors were entitled to earn their wages.

COURT OF COMMON PLEAS.

LONDON, Feb. 5, 1801.

John Gordon Sinclair, Esquire *versus* Louis Stanislaus Xavier, King of France, and his brother Monsieur.

MR. *Sergeant Best* shewed cause against a rule granted on a former day, on a motion made by Mr. Serjeant *Shepherd*, why the defendant's bail should not be discharged, and the bail bond given up to be cancelled, upon filing common bail; one of the defendants, his royal highness *Charles Philippe Monsieur*, having been arrested on two different actions by the plaintiff, for several considerable sums of money, owing to him for raising and ceding a regiment of defendants' in *Germany*, 1792, and for money lent, paid and expended, on the defendant's account, in *England*.

The arguments on both sides were eloquent and very interesting; they were principally founded upon affidavits filed in court, and on the alien act, made to protect aliens in this country against being held to bail for debts contracted out of the *British* dominions. It appears that the plaintiff had, at different times, been advised to arrest the prince, in order to induce our ministers to pay the debt; which appeared to be due, not only upon the joint note of hand of *Louis Stanislaus Xavier* and *Charles Philippe*, for 80,625 livres, but also for other large sums paid by the plaintiff for defendants, in *England* and upon the continent, according to the accounts stated, settled here in *England*, and which were exhibited in court.

It further appeared, that the prince, so recently as in *December* last, had appointed an arbitrator on his part, and plain-

tiff had appointed another to settle and compound the whole debt and interest due from 1792. That the said arbitrators had settled and fixed upon the sum to be paid plaintiff, being debts and engagements for which he had been arrested, and been obliged to pay for defendant in *England*; and in consideration of the said sum to be paid plaintiff, he was to give the king and prince a general release, and had subscribed to an agreement for the same; and for that purpose a deed of release had been actually engrossed and executed for plaintiff. Several appointments were made to pay the money, but that suddenly and without any reason assigned, the business was dropped; which so much enraged the plaintiff, that he threatened to arrest the defendant, and was answered that he might do so.

It was acknowledged in court, that the plaintiff had treated his royal highness with every possible delicacy due to his situation.

Lord *Eldon* was of opinion, the cause of action arose out of the contract made at *Coblentz* between the plaintiff and defendant, to raise, and his afterwards ceding a regiment; and that the alien act also protected them against the action brought to recover moneys lent, paid and expended, on account of his royal highness *Charles Philippe*, now in *England*; and accordingly common bail was ordered to be filed in the cause.

Virginia Legislature. House of Delegates.

AMENDMENT OF THE CONSTITUTION.

Thursday, January 11, 1810.

THE committee to whom was referred the communication of the governor of *Pennsylvania*, covering certain resolutions of the legislature of that state, proposing an amendment to the constitution of the *United States*, by an appointment of an impartial tribunal to decide disputes between the state and federal judiciary, have had the same under their consideration, and are of opinion that a tribunal is already provided by the constitution of the *United States*, to wit, the supreme court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal which could be created.

The members of the supreme court are selected from those in the *United States* who are most celebrated for virtue and legal learning, not at the will of a single individual, but by the concurrent wishes of the president and senate of the *United States*: they will therefore have no local prejudices and partialities. The duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal and several state courts together, and with the admirable symmetry of our government. The tenure of their offices enables them to pronounce the sound and correct opinions they may have formed, without fear, favour or partiality.

The amendment to the constitution proposed by *Pennsylvania* seems to be founded upon the idea that the federal judiciary will, from a lust of power, enlarge their jurisdiction to the total annihilation of the jurisdiction of the state courts,

that they will exercise their will instead of the law and the constitution.

This argument, if it proves any thing, would operate more strongly against the tribunal proposed to be created, which promises so little, than against the supreme court, which, for the reasons given before, have every thing connected with their appointment calculated to insure confidence. What security have we, were the proposed amendment adopted, that this tribunal would not substitute their will and their pleasure in place of the law? The judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution: they hold neither the purse nor the sword, and even to enforce their own judgments and decrees, must ultimately depend upon the executive arm. Should the federal judiciary, however, unmindful of their weakness, unmindful of the duty which they owe to themselves and their country, become corrupt, and transcend the limits of their jurisdiction—would the proposed amendment oppose even a probable barrier in such an improbable state of things?

The creation of a tribunal such as is proposed by *Pennsylvania*, so far as we are enabled to form an idea of it from the description given in the resolutions of the legislature of that state, would, in the opinion of your committee, tend rather to invite than prevent a collision between the federal and state courts. It might also become, in process of time, a serious and dangerous embarrassment to the operations of the general government.

Resolved, therefore, That the legislature of this state do disapprove of the amendment to the constitution of the *United States* proposed by the legislature of *Pennsylvania*.

Resolved, also, That his excellency the governor be, and he is hereby requested to transmit forthwith a copy of the foregoing preamble and resolutions to each of the senators and representatives of this state in congress, and to the executive of the several states in the union, with a request that the same be laid before the legislature thereof.

The said resolutions being read a second time, were, on motion, ordered to be referred to a committee of the whole house on the state of the commonwealth.

PENNSYLVANIA.

Opinion on the Operation of an Act of the Legislature of Pennsylvania concerning Banking Institutions.

THE act supplementary to an act, entitled "an act relating to the association of individuals for the purpose of banking," is said to have two objects for its aim and end: the one, the suppression of all associations formed by individuals for the purpose of banking, which existed and were in operation before and at the time of passing this act: and the other, the prevention of all such associations for the future. The latter provision, being merely prospective, involving in it no private injury, and prescribing a rule of conduct to be observed for the future, belongs to the constitutional power of the legislature to enact.

The case of the *Farmers' Bank of Lancaster* falls entirely within the former provision, which will therefore require a particular examination.

Let us then consider the operation of this clause of the act upon that institution under a twofold view: 1st, the state of that association, in fact and in law, at the passing of this supplement: and 2dly, whether this act in any way would affect that establishment if it even were so meant and intended.

On the first point for investigation, the matters of fact upon which the question to be decided arises are plain, simple and free from all uncertainty. On the 10th of *January* 1810 the stockholders of the *Farmer's Bank of Lancaster* associated, by written articles of association; in which the object of the association, the mode of conducting it, not only as amongst themselves, but as between them and all persons transacting business with them, and the duration of the establishment, are stipulated. In consequence, arrangements were immediately made for organizing and putting into complete operation the association as a banking institution, which accordingly be-

gan on the 19th of *February* following, and continued in operation through all the details incident to such an establishment until the passing of this act. Officers had been appointed and salaries fixed, a banking house rented and fitted for the purpose, the funds paid in according to contract, notes to a large amount fabricated and put into circulation, deposits daily made and paid out, and discounts extensively made, before this supplement was enacted. An important question here occurs, were these things lawfully done? The legislature shall answer this inquiry.

The right of individuals to associate for the purposes of banking not being interdicted by the constitution, nor prohibited by law, has uniformly been considered as a private right belonging to the citizens of *Pennsylvania*. Accordingly we find, that such associations, in the restricted form of their joint funds only being made liable for their engagements, have existed, been approbated by the legislature, and made the groundwork of acts of incorporation.

The *Philadelphia Bank* in 1804, and the *Farmers' and Mechanics' Bank* of *Philadelphia* in 1809, are both founded upon and grow out of such associations. On the 28th of *March* 1808, this right of individuals to associate for banking purposes became the subject of legislative consideration, when by the enactment of a law upon the subject they recognise the right to associate, and undertake to modify and narrow its enjoyment for the future. Anxious to monopolize the right of selling charters of incorporation, which would exempt those who would purchase them from all personal responsibility, the legislature thought fit by the law which they then passed, entitled "an act relating to the association of individuals for the purpose of banking," to subject every member of any association thereafter formed for the purpose of banking, and his assigns, to personal liability for the debts and engagements contracted before and while he remained a member of the association. This law drew a line of distinction between banking establishments, dividing them into those which acted without any personal responsibility on the part of the stockholders

for the debts and engagements of the institution, having purchased their exemption from the government; and those in which the personal responsibility of the stockholders, during their continuance as such, for the debts and engagements of the institution remained. But the latter kind are as much incorporated banks as the former, where, in their articles of association they conform themselves to the provisions of this law; the contract of association acted upon and carried into effect, cooperating with the act of the legislature which looks forward to it, becomes incorporated with and is to all intents and purposes part of the act; so as to produce a complete incorporation of the association. A corporation aggregate is nothing more than an association of individuals formed with the consent of the legislature for specific legal purposes, contained in and defined by their articles of association. This consent may be either express or implied, and is equally available. There are two modes in ordinary use in legislation for conferring corporate rights upon private establishments; the one by enacting a general law, defining the principles which the legislature deem expedient to impress on the associations, and referring it to the members of the institutions either with or without control from others to form the details, which are to constitute the charter; and the other that of passing a particular law adapted to each particular application, making the legislature not only declare the principles but form all the details of a mere private institution. As this latter mode is often irksome, seldom useful, and always burthensome to individuals, and greatly expensive to the public, a provident foresight in cases of private concern, where there is nothing gotten from the legislature, which they expect to be paid for, has given a preference to the former mode of enacting a general law. Thus in the case of all literary, charitable, and religious institutions, the legislature passed a general law on the 6th of *April* 1791 defining the principles on which they might be incorporated, and referring the formation of their charters to the members of the society under the superintendence of the attorney-general and the supreme court as to their lawfulness; which charters, when once

formed, incorporate with the act of assembly, and become corporations. The legislature might have referred the formation of the association to the members alone; and it would have been equally valid if they had formed them in conformity to the law, as they now are, under the sanction and superintending authority of the attorney-general and court.

In the case of associations for the purpose of banking, under the law of the 28th of *March* 1808, the legislature have wisely left it to the stockholders to form their charters, well knowing that the general principles of law would make void any stipulations they might contain contrary to the laws of the land. The *Farmers' Bank of Lancaster*, having come into existence under the authority of this law unimpaired by its supplement, its organization and practical operation conforming to its letter as well as its spirit, it became incorporated with, and arose from its bosom, as a chartered corporation, protected by the plighted faith of the legislature.

The only plausible objection which can be urged against this being an incorporated institution is, that the act does not in terms say, that associations for the purposes of banking "hereafter" formed (that is, after the passing of the act of *March* 28th 1808) shall be incorporated banks; nor was it at all necessary that it should be so said to make them so. In *England*, the right of granting charters of incorporation belongs to the king, and he may create them by the words "create, erect, found, incorporate," or the like. Nay, it is held, that if the king grant to a set of men to have a mercantile meeting or assembly, this is alone sufficient to incorporate and establish them for ever. 1 *Black. Com.* 478, 474.

There is no magic in words when applied in legislation, much less any technical nicety of expression required to convey the legislative meaning on any subject. The legislature do and have a right to use any terms adapted to convey their meaning, and where that is apparent, the expression must be so understood as to give effect to their intent. In this act, the right to form these associations for the purpose of banking is admitted, and the character which they are hereafter to sustain is by the act defined to be that of associations for the

purpose of banking, the members of which and their assigns shall be personally responsible for the debts and engagements of the institution contracted before and while they continue members. This is the very definition given by the legislature in their act of the associations they meant should exist; and it describes and covers the *Farmers' Bank of Lancaster* as the skin covers the human frame. How then can it be pretended that the foundation of this institution is not bottomed in and the superstructure growing out of this legislative act? Is there any intelligent man of our day, who does not know that the celebrated *Manhattan Bank of New York* grew out of certain expressions used by the legislature of that state in an act made for supplying that city with water, in which the erection of a bank was never once thought of; though the language used, by a fair construction, admitted of that exposition? Much more so shall an act, whose avowed object was the regulation of such associations, give the sanction of its protection to an institution originating under it, and conforming in its letter and spirit to all its restrictions and regulations.

The second view meant to be taken of this supplement was, whether it would in any way affect this bank, if even it were so intended? If the opinion given upon the first point be correct, that the *Farmers' Bank of Lancaster* is an incorporated bank under the act of the legislature passed the 28th of *March* 1808, this supplement never meant to apply to, or interfere with it, as it expressly restricts its operations to "associations for the purpose of banking, and which are not incorporated by law." This clause was evidently thrown in by the legislature to avoid even the appearance of interference with rights sanctioned by contract and by the plighted faith of the government; and which they, one and all, well knew were placed under the safeguard of the constitution, and excepted out of the general powers of government. Indeed, the expressions of this act are more adapted to describe associations for the purpose of banking, which had not, but were intended to be, put into operation, than those which were organized and completely operating as banking institutions before and at

the time the law passed. If so, the rules of construction as well as a just respect for the legislature would lead to an exposition of it, which would apply its provisions to those embryo banking institutions, which looked forward to a future establishment; and not to those associations, which were in practical operation as banking establishments when the law passed, and consequently out of the power of the legislature in any way to affect.

But supposing (without admitting) for the sake of a full exposition of this supplement in all its bearings, that it was intended to operate on the *Farmers' Bank of Lancaster*; the question would then occur, would it be constitutional or not?

This inquiry involves in it the rights of the people and the power of the government. Fortunately for *Americans*, both their federal and state governments are founded upon solemn compacts, which recognise the people as the true and only source of all legitimate power, and as one of the parties to these contracts with their governments.

The powers granted to the government they have a right to exercise; the rights retained by the people the government cannot invade. The people of *Pennsylvania* "to the end that the general, great and essential principles of liberty and free government may be recognised and unalterably established," declare in the 19th section of the 9th article of the constitution "that no *ex post facto* law, nor any law impairing contracts, shall be made." And in the 26th section of the same article it is declared, that every thing in this article "is excepted out of the general powers of government, and shall for ever remain inviolate."

The constitution of the *United States* in section 10 of article 1. declares, that "no state shall make any *ex post facto* law, or any law impairing the obligation of contracts."

In these sections of the constitutions, the power of the legislature to interfere with contracts is expressly declared not to be granted to them; but to be excepted out of the general powers of government. And to shew the unalterable attachment of the people to the rights they reserved and the restrictions they impose on the government, which they considered

as essential to the preservation of liberty and free government, they declare these rights and reservations shall remain for ever inviolate. These rights and reservations are fundamental rules of our social compact, imposed by the people in their creation of the government, and which the constitutional authorities, their creatures, are bound to obey.

If then in this supplement it could be supposed that the legislature, contrary to all reason and conscience, intended to suppress, or even to impair, the solemn contract entered into on the faith of an act of assembly between the stockholders themselves and between them and those who should transact business with them, it would be an act done against the most positive and sacred obligations not to do it; it would be a palpable invasion of the constitutional rights of the people, and would be consequently null and void to all intents and purposes. I am therefore of opinion:

1st. That the articles of association of the *Farmers' Bank of Lancaster*, being bottomed on the act of assembly of the 28th of *March* 1808, and carried into effect through all the details of a banking institution before this supplement was passed, acquired that inviolability conferred by the constitution upon contracts that no act of the legislature could impair them.

2d. That the articles of association being authorised by, and conforming to the terms prescribed by, the act of assembly of the 28th of *March* 1808, incorporated with it; and being carried into complete effect before this supplement passed, made the *Farmers' Bank of Lancaster* an incorporated bank before and at the time this supplement passed; and consequently that it is, not within the description and operation of that law.

JAMES HOPKINS.

CIVIL LAW.

Translated for the American Law Journal.

A Translation of the Second Title of the Twenty-second Book of the Digests, entitled, De nautico Fœnore.

DIGEST, Book XIV. Tit. II.

Of Maritime Loan.

LAW I.

Modestinus, lib. 10. Pandectarum.

TRAJECTITIA. What is called *maritime money* (*pecunia trajectitia*) is money which is carried beyond the sea; if it should be consumed in the same place it will not be *maritime*: But it is to be considered whether the merchandize purchased with that money has been purchased with that view; and it is material that it should navigate at the peril of the creditor. Then the money becomes *maritime*.

LAW II.

Pomponius, lib. 3. ex Plautio.

• *Labeo ait.* *Labeo* says: If there is nobody on the part of the borrower on whom process can be served to compel him to pay the maritime money, the fact must be proved by testimony, and it will be equivalent to a legal demand.

LAW III.

Modestinus, lib. 4. Regularum.

In nauticâ. In a maritime loan the lender undertakes the risque from the day that the vessel is appointed to sail.

LAW IV.

Papinianus, lib. 3. Responsorum.

Nihil interest. It matters not whether the maritime money has been taken without being at the risque of the lender, or whether it ceased to be at the risque of the creditor after the expiration of the term or performance of the condition, in either of these cases no more than the common legal interest shall be due; and never in the first case, nor in the second from the time that the risque ceases, shall goods pledged or hypothecated be retained for a higher interest.

§ 1. The daily reward of a servant sent for the purpose of recovering the maritime money shall not exceed double the lawful interest of one per cent. per month. If the stipulation of interest to be paid after the risque expires does not amount to the whole legal interest, it may be supplied by another stipulation for the servant's labour.

LAW V.

Scævola, lib. 6. Responsorum.

Periculi pretium. The price or compensation of risque is whatever is given over and above the money received on a penal condition not actually existing, provided the contract is not of a gaming or wagering species, from which the condition is to arise, as *if you manumit, if you do not do such a thing, if I shall not recover from sickness, &c.* But there is no doubt where money is lent to a fisherman to purchase fishing tackle, to be repaid *in case he shall catch fish*, or to a prize-fighter to fit himself for the combat, to be repaid *in case he shall come off conqueror*.

§ 1. But in all these cases a simple contract without a stipulation is sufficient to sanction the obligation.

LAW VI.

Paulus, lib. 25. Quæstionum.

Fenerator. A person having lent money at maritime risque, has taken in pledge some goods shipped on board of the vessel; and further, in case these should not be sufficient to satisfy the whole debt, other goods shipped on other vessels already pignored to other lenders, are pignored to him in case there shall be any residue; it is now asked, whether if the ship out of which he was to have been paid the whole be lost, it is to the damage of the lender, or whether he has yet a recourse on the residue of what was shipped on other vessels? I answer: in general the diminution of the pledge is to the damage of the debtor and not of the creditor, but when maritime money is thus given, *that the lender has no right to demand his money unless the vessel arrives safe at the fixed time*, the obligation of the debt is extinguished by the nonexistence of the condition, and therefore the lien on the pledge is also gone, even on those that are not lost: if the vessel is lost within the time fixed for the end of the risque, the condition of the stipulation is extinguished, therefore there is no ground for prosecuting a lien on the pledges that were shipped on board of other vessels. At what time then is the creditor to be admitted to prosecute such liens? Only when the condition of the obligation is actually in existence, and in case the pledge should be lost by another accident, or should sell for less than the money due, or if the vessel should be lost after the time when she ceases to be at the risque of the lender.

LAW VII.

Idem, lib. 3. Ad Edictum.

In quibusdam. Maritime interest is due on certain contracts agreeable to the stipulation. For if I lend ten pieces on this condition *that if the ship arrives safe, I shall receive the principal with a certain interest*, then I may receive the principal with the interest stipulated.

LAW VIII.

Ulpianus, lib. 77. Ad Edictum.

Servius ait. *Servius* says, that the penalty of a maritime loan cannot be demanded, if the creditor had it in his power to receive his money within the limited time.

LAW IX.

Labeo, lib. 5. Pithanon à Paulo Epitomatorum.

Si trajectitiæ. If the penalty of a maritime loan has been stipulated for in the usual manner, although on the day of payment nobody should be alive that might be said to owe the money, yet the penalty is forfeited as if the debtor had left an heir.

Translation of the Twenty-third Title of the Fourth Book of the Code entitled, De nautico Fœnore.

CODE, Book IV. Tit. XXIII.

Of Maritime Loan.

LAW I.

*Impp. Dioclet. & Maxim. A. A.
Honorato.*

Trajectitiæ. It is clear that maritime money lent at the risque of the creditor, bears an interest different from the legal one, only until the arrival of the vessel at the port of her destination.

LAW II.

Idem, A. A. Chosimania.

Cum dicas. If you say that you have lent money on condition, *that it should be returned to you in the holy city*, and if you do not declare that you undertook the uncertain dangers of the seas, there is no doubt that you cannot recover any more than common legal interest for money so lent.

LAW III.

Idem, A. A. Junia.

Cum proponas. If you declare to have lent money at maritime interest on this condition, *that you should be paid after the arrival at Salo of a vessel which the debtor asserted to be bound for Africa*, so that you only undertook the risque of the voyage to Africa; and by the fault of the debtor the ship was seized for contraband goods loaded on board of her, the reason of the law will not permit that the damage of the loss of the goods, which happened not by stress of weather, but by the greedy avarice and insolent behaviour of the debtor, should fall upon you.

LAW IV.

Idem, A. A. Eucharisio.

Trajectitia. But the loss of maritime money lent at the peril of the creditor, before the vessel reaches the place of her destination, must not fall upon the debtor, otherwise, without an agreement of this kind, the debtor should not be freed from his engagement even by the misfortune of shipwreck.

EXTRACT.

Ex Julio Paulo, lib. 2. Sentent. tit. 14.

TRAJECTITIA. Maritime money, in consideration of the risque which the lender runs, may, while the vessel is at sea, bear an indefinite interest.

TRANSLATION

Of the Fifth Title of the Third Book of the *French Ordinance* concerning the marine.

ENTITLED,

Des contrats à grosse aventure, ou à retour de voyage.

TITLE V.

Of Contracts of maritime Loan, otherwise called of gross adventure, or return voyage.

ARTICLE I.

ALL contracts of *maritime loan*, otherwise called of *gross adventure* or of *return voyage*, may be made either by a public notary, or under a private signature.

II. Money may be given upon the body and keel of the ship, and upon her rigging, tackle, provisions, and outfits, jointly or separately, and upon all, or any part of her lading, for one whole voyage, or for a time limited.

III. We forbid all persons to take up at maritime risque upon their ships or goods on board thereof, more than their real value, under pain of being obliged, in case of fraud, to pay the whole sums notwithstanding the vessel should be lost or taken.

IV. We also forbid, under the like penalty, to take up any money upon the freight for the voyage to be made, or upon the profit expected on the lading, or even upon the seamen's wages, except it be in the presence and with the consent of the master, and under one half of the aforesaid wages.

V. We moreover forbid all persons to advance any money to seamen at maritime risque upon their wages and voyages, except it be in the presence and with the consent of the master, under pain of confiscation of the sums lent, and a fine of fifty livres.

VI. The masters shall be answerable, in their own names, for the whole amount of the sums taken up by the seamen with their consent, if they shall exceed one half of their wages, and that notwithstanding the loss or capture of the ship.

VII. The ship, her rigging, tackle, apparel and provisions, and even the freight, shall be by privilege affected for the payment of the principal and interest of money given upon the body and keel of the ship, for the necessities of the voyage and the lading shall be bound for the money borrowed to procure the same.

VIII. Such as give money upon bottomry to a master without the consent of the owners, if they live in the place, shall have no security nor privilege upon the ship, any further than the part that the master may have in the ship and freight, though the money was borrowed for fitting out the ship or for buying provisions.

IX. However, the parts of such of the owners as refuse to furnish their proportions for fitting out the vessel, shall be affected for the money lent to the master for the equipment and provisions of the ship.

X. Creditors for money formerly due on such things and left outstanding by renewal or continuation of the contract, shall not come in competition with those that have actually lent for the last voyage.

XI. All contracts of maritime loan shall be null after the entire loss of the effects upon which the money was lent, if that happens by accident, and within the times and places therein expressed.

XII. Nothing shall be reputed *accident* that is occasioned by the internal defect of the things themselves, or by the fault of the owners, master or merchants, except it be otherwise provided by the contract.

XIII. If the time of the risque be not specified by the contract, it shall last as to the ship, her rigging, tackle and provisions, from the day she sets sail, till she arrives at her intended port, and is moored at the wharf; and as to the goods, it shall last from the moment they are laden on board the ship

or lighter to be carried thither, till they be unladen, and ashore.

XIV. A person lading goods, and taking up money upon them at maritime risque, shall not be acquitted by the loss of the ship and lading, unless he makes it appear that he had there, upon his own account, effects to the value of the sum borrowed.

XV. However, if the person that has taken money at maritime risque, make it appear that he could not ship goods to the value of the sum borrowed, the contract (in case of loss) shall be diminished in proportion to the value of the effects laden, and shall only subsist on the overplus; of which the borrower shall pay the interest, according to the current price of the place where the contract is made, till the actual payment of the principal: and if the ship arrives in safety, there shall be due only the legal interest, and not the maritime profit of the overplus of the effects put on board.

XVI. Those that give money at maritime risque shall contribute (to the discharge of the borrowers) to general average: such as ransoms, compositions, jettisons, masts and ropes cut for the common safety of ship and goods, but not for simple average or particular damage that may happen, except there be some agreement to the contrary.

XVII. However, in case of shipwreck the contract of maritime loan shall be reduced to the value of the effects that are saved.

XVIII. If there be a contract of maritime loan, and an insurance upon the same cargo, the lender shall be preferred to the insurers upon the effects preserved from shipwreck, for his capital, and no further.

[The following law was passed in *March* 1809, and is republished in the *Law Journal* that it may be imitated by the legislatures of the other states. It is understood that the tax in *Chester* county produced during the first year the sum of 1200 dollars.]

An Act laying a Tax on Dogs in certain counties, and for other purposes.

SECT. I. *BE* it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That it shall be the duty of the commissioners of the city and county of *Philadelphia*, and of the counties of *Bucks*, *Chester*, *Montgomery* and *Delaware*, and they are hereby required to cause an accurate return to be taken annually by the assessors of the several townships, wards or districts within their respective counties, of all dogs upwards of one month of age, owned or possessed by any person or persons within their respective townships, wards or districts, particularly noting the number owned or possessed by each person and kept about any one house; and when the said commissioners shall have so ascertained the number of dogs aforesaid, they shall levy and cause to be collected annually from every person or persons owning and possessing one dog, twenty-five cents, and for every second dog kept about the same house one dollar; and for every additional dog, two dollars, by the collectors of the several townships, wards or districts, at the same time and in the same manner the county rates and levies are collected, for which the said collector shall be allowed five per centum out of the money so collected. And it shall be the duty of the county treasurers to keep separate accounts of the money arising from the tax on dogs, and the said money shall be and hereby is appropriated as a

fund for remunerating the inhabitants of the said counties respectively, for any loss they shall sustain after the passing of this act, by sheep being destroyed by a dog or dogs, except the tax arising by this act within the city of *Philadelphia*, the township of the *Northern Liberties* and the district of *Smith-wark*, which shall be paid by the collectors to the treasurer of the guardians of the poor, and by them appropriated for the support of the poor of the said city, township and district.

SECT. II. *And be it further enacted by the authority aforesaid*, That when any inhabitant of the counties aforesaid shall have had any sheep destroyed by a dog or dogs, he or she may apply to the appraisers appointed by this act, and they or any two of them are hereby authorised and required to view and ascertain the damage sustained by the owner of such sheep destroyed as aforesaid, and when they shall have ascertained the legality of the claim and the damages so sustained, they or any two of them shall certify the same under their hands and seals to the commissioners of the county, who shall draw their warrant on the treasurer of the county for the amount so certified to be paid out of the fund arising from the tax on dogs; but if there shall not be sufficient money in the treasury belonging to the said fund, then the said warrant shall be kept by the person in whose favour it shall have been drawn, and be paid out of the first money that shall come into the treasury belonging to said fund.

SECT. III. *And be it further enacted by the authority aforesaid*, That the persons elected to audit and settle the accounts of the supervisors of the highways in the several townships, wards and districts, shall be, and they are hereby appointed appraisers of the damage done by dogs within their respective townships, wards or districts, and shall have full power and authority to examine any person that shall appear before them, respecting the premises upon oath or affirmation, to be by them administered.

SECT. IV. *And be it further enacted by the authority aforesaid*, That every dog kept or staying about any house shall be deemed sufficient evidence of ownership to authorise the assessor to return the person inhabiting said house as the

owner or possessor of such dog, and any person sending his or her dog from house to house, or from place to place, in order to evade the said tax, shall be liable to pay double tax therefor, and every dog not returned shall be deemed to have no owner, and may be lawfully killed by any person seeing him running at large.

SECT. V. *And be it further enacted by the authority aforesaid*, That if any dog shall be seen worrying sheep, it shall be lawful for any person seeing the same to kill such dog, or if any dog shall have been known to worry sheep, and information thereof be given to the owner of such dog, if he does not kill or cause him to be killed, he shall make full compensation for all damage done by said dog, and any person seeing said dog running at large, may lawfully kill him.

SECT. VI. *And be it further enacted by the authority aforesaid*, That the surplus money remaining in the treasury of the aforesaid counties on the first day of *May* annually (after deducting what may probably be wanted before another tax can be collected) arising from the tax on dogs, shall be applied by the commissioners of said counties in purchasing a number of *Marino* rams and ewes of the full blood, which shall be placed by them in the most convenient places in the said county for the benefit of the farmers; and every farmer shall have liberty to send three ewes to some one ram in said county to continue with him for one week free of expense, except a reasonable compensation for pasturage. The ewes of the full blood shall be kept with some ram of the same full blood, and the male product thereof shall be placed at one year old in some other convenient place in the county for the benefit of the farmers aforesaid; and the female product to be kept with the ram of the full blood, in order to increase the stock and keep the blood pure. And whenever the commissioners of any county shall be of opinion that such breed of sheep shall have so increased as to render it proper to dispose of any part thereof, they may sell so many of them as they shall think proper, for the best price that can be obtained for the same, (always giving the farmers of their respective counties the preference); and the product arising from such

sale, together with the surplus funds arising from the tax on dogs, shall be applied in procuring some other approved breed of sheep, to be placed in their respective counties in manner aforesaid; or for the importation from *Europe* or elsewhere, the most approved breed of cattle to be placed in their respective counties for the benefit of the farmers, in the same manner as is provided for sheep.

SECT. VII. *And be it further enacted by the authority aforesaid*, That the return of the number of dogs taken in the county of *Delaware*, under an act passed the tenth day of *April*, one thousand eight hundred and seven, entitled "An act authorising the commissioners of *Delaware* county to lay a tax on dogs," shall be as valid to all intents and purposes as if taken under the provisions of this act, and the said recited act is hereby repealed and made void.

JAMES ENGLE, *Speaker*
of the house of representatives.

P. C. LANE, *Speaker of the Senate.*

APPROVED—the twenty-third day of *March*, one thousand eight hundred and nine.

SIMON SNYDER.

[The legislature of *Pennsylvania* have lately tried an experiment of substituting the system of compulsory arbitrations, for the long-tried and wholesome system of trial by jury. We publish it that it may be known to the readers of our Journal who do not reside in *Pennsylvania*. It is the result of much deliberation, and if it should not be found to effectuate the object intended by it, we hope it will be remembered only as a warning to those who may hereafter wish to depart from the path which the wisdom of ages has pronounced to be the safest as well as the nearest to the temple of justice.]

An Act Regulating Arbitrations.

SECT. I. *BE* it enacted by the senate and house of representatives of the commonwealth of *Pennsylvania*, in general assembly met, and it is hereby enacted by the authority of the same, That from and after the first day of *May* next, it shall and may be lawful for either party, his, her or their agent or attorney, in all civil suits or actions pending or that may hereafter be brought in any court of this commonwealth having either original or appellate jurisdiction of such suits or actions, to enter at the prothonotary's office, at any time after the entry of such suits or actions, excepting appeals to the register's court, or issues directed by the said court, a rule of reference, wherein the said party shall state his, her, or their determination to have arbitrators chosen, on a day certain to be mentioned therein, not exceeding thirty days thereafter, for the trial of all matters in variance in such suit or action between the parties, which rule shall be entered on record by the prothonotary and the following proceedings shall be had thereon, *that is to say*: The party, whether by his, her, or their agent or attorney, or otherwise, entering the rule of reference, shall under the penalty of ten dollars to be recovered by the adverse party, as debts of equal amount are by law recoverable, procure from the prothonotary a copy thereof under his hand and seal, and serve, or cause to be served, the same, or a copy thereof, on the opposite party, his, her or their agent or attorney; or if not to be found, leave a copy

thereof at his, her or their last place of abode, giving at least ten days' notice in the city and county of *Philadelphia*, of the day and time when the arbitrators are to be chosen, and at least fifteen days' notice of such time in the other counties of this commonwealth, and the proof of service shall be the oath or affirmation of the person serving the same: *Provided always*, That no rule of reference shall be entered unless such entry be made at least thirty days previous to the first day of the third term after such suit or action has been brought: *And provided also*, That in such suits or actions which may have been pending in any of the courts of this commonwealth more than six months previous to this act going into operation, such suits or actions shall not, without the consent of both parties, be referred in term time, or during the sitting of any court at which such suit or action may have been marked for trial: *And provided also*, That in all civil suits or actions pending, or that may be brought in any court of this commonwealth wherein the commonwealth may be a party, either plaintiff or defendant, it shall be the duty of the attorney-general or his deputy, and they are hereby empowered and required to appear on the part of the commonwealth, and to do all such matters and things in such civil suits or actions as may be necessary and is required by this act in similar cases.

SECT. II. *And be it further enacted by the authority aforesaid*, That where both parties attend, either by themselves, their agents or attorneys, the arbitrators shall be chosen in the following manner, *to wit*: The parties having first agreed as to the number of arbitrators, or in case of disagreement the number shall be fixed by the prothonotary, which shall be either three, five, or seven, the plaintiff shall, in the first place, nominate one person, if the number fixed upon be three, two if the number be five, and three if the number be seven; if all or either of them be objected to by the defendant, the plaintiff shall nominate other persons in place of those objected to, until he nominates six persons for each and every person allowed to be by him nominated, and the same privilege shall be given to the defendant, and the like right to object be extended to the plaintiff; and in case the parties agree in the

choice of arbitrators as above directed, the umpire shall be chosen in the following manner, *to wit*: The parties shall nominate alternately, beginning with the plaintiff, seven persons, with liberty to each or either of them, in turn, to object to such nomination; and if all the persons thus nominated be objected to, the prothonotary shall name a suitable and disinterested person for the umpire; if he be objected to by either of the parties, the prothonotary shall name another, and so on until he name seven persons; if all are objected to he shall make out a list of three suitable and disinterested persons, if the number of arbitrators be three; five if the number of arbitrators be five; and seven if the number of arbitrators be seven; the parties shall then strike out, alternately, beginning with the plaintiff, until the name of only one person be left, who shall be the umpire.

SECT. III. *And be it further enacted by the authority aforesaid*, That if only one of the parties, their agents or attorneys, attend on the day appointed to choose arbitrators, it shall be the duty of the prothonotary to fix the number of arbitrators and nominate for the absent party and also object to the nominations made by the party present, if he thinks necessary: *Provided always*, That before the foregoing proceedings be had, if the party absent be the party who has not entered the rule of reference, proof shall be made on oath or affirmation that due notice was served on such party, agreeably to the provisions contained in the first section of this act.

SECT. IV. *And be it further enacted by the authority aforesaid*, That when both parties attend on the day appointed to choose arbitrators, either by themselves, their agents or attorneys, and a greater number of persons should be objected to than is above stated, the prothonotary shall make out a list containing the names of five suitable disinterested persons for each and every one of the number of arbitrators so as aforesaid agreed upon, or fixed by the prothonotary, from which list the parties, their agents or attorneys, shall strike out alternately, beginning with the plaintiff, until the number be left so agreed on or fixed, and the persons thus selected shall be the arbitrators to determine such suit or action: *Provided*

books, papers or documents that they shall deem material to the cause; and likewise to decide the law and the fact that may be involved in the cause to them submitted; and moreover, the said arbitrators, or a majority of them that are present, shall have full power to adjourn their meetings from day to day, or for a longer time; and also from place to place, if they think proper, and if both parties appear, either by themselves, their attorneys or agents, before the arbitrators, on the first or any subsequent day of meeting, or if any one of the parties be absent, unless prevented by sickness, or some unavoidable cause, the sufficiency of which shall be left to the discretion of the arbitrators, then, and in either case, the arbitrators shall proceed to investigate, examine and decide the cause, suit or action to them submitted, and report their determination, and make out an award, signed by all, or a majority of them, and transmit the same to the prothonotary within seven days after they have agreed upon their report, who shall make an entry thereof on his docket, which from the time of such entry shall have the effect of a judgment against the party against whom it is made, and be a lien on his real estate until such judgment be reversed on an appeal.

SECT. XI. *And be it further enacted by the authority aforesaid,* That if either of the parties shall be dissatisfied or think him, her or themselves, aggrieved by the report of arbitrators made as aforesaid, he, she or they, shall have an appeal to the court in which the cause was pending at the time the rule of reference was entered, under the following rules, regulations, and restrictions, *to wit:* The party appellant, whether plaintiff or defendant, his, her or their agent or attorney, shall swear or affirm that it is not for the purpose of delay such appeal is entered, but because such party firmly believes injustice has been done; and the party, his, her or their agent or attorney shall enter such appeal with the prothonotary of the proper county with the bail and recognizance hereinafter required, within twenty days after the entry of the award of the arbitrators on his docket, and if such appeal, bail, and recognizance should not be entered within the time above-mentioned, then it shall be the duty of the prothonotary, at

the request of the party in favour of whom the report of the arbitrators shall have been made, to issue execution or such other process as may be necessary to carry into complete effect and operation such judgment obtained as aforesaid: *Provided always*, That where judgment has been rendered for any sum or sums of money, the like stay of execution shall be had, under the like regulations as is provided by the seventh section of an act entitled "An act to regulate arbitrations and proceedings in courts of justice," passed the 21st of *March* one thousand eight hundred and six. *Provided also*, That no appeal shall be allowed to either party until the appellant pay all the costs that may have accrued on such suit or action. *And provided also*, That the appellant shall not be permitted to produce as evidence in court any books or documents which he or they shall have withheld from the arbitrators.

SECT. XII. *And be it further enacted by the authority aforesaid*, That if the plaintiff be the appellant, he shall by himself, his agent or attorney, with one or more sufficient sureties, be bound in recognisance with the prothonotary, the condition of which shall be, that if the said plaintiff shall not recover in the event of the suit a sum greater, or a judgment more favourable, than the report of the arbitrators, he shall pay all costs that shall accrue in consequence of said appeal, and one dollar per day for each and every day lost by the defendant in attending on such appeal, which costs and daily pay shall be taxed and recovered as costs in other cases are recoverable.

SECT. XIII. *And be it further enacted by the authority aforesaid*, That the costs to be paid by the appellant, as required by the proviso of the eleventh section of this act, shall nevertheless be taxed in the appellant's bill, and recovered of the adverse party in such cases only where in the event of the suit the appellant is entitled to recover costs agreeably to the provision contained in this act.

SECT. XIV. *And be it further enacted by the authority aforesaid*, That if the defendant be the appellant he shall, by himself, his agent or attorney, produce one or more sufficient sureties, who shall enter into a recognisance with the protho-

notary, in the nature of special bail, the condition of which shall be, that if the plaintiff in the event of the suit shall obtain a judgment for a sum equal to, or greater, or a judgment as, or more favourable than the report of the arbitrators, the said defendant shall pay all the costs that may accrue in consequence of said appeal, together with the sum or value of the property or thing awarded by the arbitrators, with one dollar per day for each and every day that shall be lost by the plaintiff in attending to such appeal, or in default thereof shall surrender the defendant or defendants to the gaol of the proper county, in discharge of the said recognisance, which sum, cost, and daily pay shall be recovered as is provided by the foregoing section of this act. *Provided*, That where executors or administrators may be the party appellant as aforesaid, they shall have an appeal as is by law allowed in other cases.

SECT. XV. *And be it further enacted by the authority aforesaid*, That all suits now depending in the court of common pleas of *Philadelphia* county, on appeals from the awards of arbitrators made in pursuance of the act of the twenty-ninth day of *March* one thousand eight hundred and nine, while the said suits were depending in the supreme court in the eastern district, be, and the same are hereby transferred to the said supreme court, and considered, to all intents and purposes, as if such appeals had been made to the supreme court, and the like proceedings shall be had thereon in the said last mentioned court as if the appeal had been entered to the same.

SECT. XVI. *And be it further enacted by the authority aforesaid*, That it shall be the duty of the prothonotary of the court of common pleas of *Philadelphia* county, and he is hereby required, immediately after the passing of this act, to transmit to the prothonotary of the supreme court of the eastern district, all the pleadings and other papers filed in said suits, together with a transcript of the record containing all the proceedings of the said court of common pleas in the suits aforesaid, and the said prothonotary of the supreme

court of the eastern district is hereby required to receive and enter the same on his docket.

SECT. XVII. *And be it further enacted by the authority aforesaid*, That the prothonotary of the proper county, an alderman, or a justice of the peace, or either of the arbitrators, shall have power to issue subpoenas for witnesses; and, if necessary, attachments to compel their attendance, and the form of the subpoena shall be as follows, viz.

County, ss.

The commonwealth of *Pennsylvania* to — greeting: We command you and each of you, that you be and appear in your proper persons before *A. B. C. D.* &c. arbitrators appointed to hear and decide all matters in variance between the parties in a certain action wherein *E. F.* is plaintiff and *G. H.* defendant, at the house of *I. K.* in the township of — on — the — day of — next, then and there to give evidence on the part of the (plaintiff or defendant as the case may be). Hereof fail not under the penalty which may ensue.

Witness my hand the — day of — A. D.

(Signed) *L. M.* one of the arbitrators.

And the form of the attachment shall be as follows, viz.

County, ss.

The commonwealth of *Pennsylvania* to the constable of the township of —: We command you that you take — late of the county aforesaid, and have him forthwith before *A. B. C. D.* &c. arbitrators appointed to hear and decide all matters in variance between the parties in a certain action wherein *E. F.* is plaintiff and *G. H.* defendant, at the house of — in the township of — then and there to answer to such matters and things as shall be objected against him, and not depart without leave.

Witness my hand the — day of — A. D.

(Signed) *I. K.* one of the arbitrators.

SECT. XVIII. *And be it further enacted by the authority aforesaid*, That in case a majority of arbitrators shall not attend

on the day appointed for them to meet, the arbitrator or arbitrators attending shall (where the parties, they being both present, cannot agree) appoint a number of suitable persons in the place of those absent, and if but one of the parties be present, the arbitrator or arbitrators present shall appoint such persons to supply the vacancy, without consulting the party attending.

SECT. XIX. *And be it further enacted by the authority aforesaid,* That if either of the parties, their agents or attorneys, or any other person for them, shall, after the appointment of any arbitrators, attempt to corrupt or influence any arbitrator or arbitrators, by privately endeavouring, either in conversation, written evidence, or correspondence, to bias the mind or judgment of such arbitrator or arbitrators in favour of such party, he, she or they, so offending, shall forfeit and pay the sum of twenty-five dollars, one half to the prosecutor, and the other half to the use of the proper county, to be recovered on conviction before an alderman or justice of the peace, in the proper county where the offence may have been committed; and it shall be the duty of the respective prothonotaries to read this section in open court on the *Wednesday* of each term for two years, and likewise to the parties, their agents or attorneys, if they or either of them attend on the day on which the arbitrators are appointed.

SECT. XX. *And be it further enacted by the authority aforesaid,* That it shall be the duty of the prothonotary, on application by both or either of the parties, their agents or attorneys, to enter a rule to take the depositions of aged, infirm, going, or absent witnesses, or those out of the state, in the same manner, and subject to the same rules and regulations now observed in the courts of this commonwealth.

SECT. XXI. *And be it further enacted by the authority aforesaid,* That the arbitrators, or a majority of them, shall have power by fine, not exceeding twenty dollars, to punish either of the parties, their agents or attorneys, or other person or persons, for disorderly conduct in their presence, or for insulting, disturbing or interrupting the arbitrators when on business; which fine shall be recovered in the following

manner: The arbitrators, or a majority of them, shall make out a certificate in the following form: "We, the undernamed arbitrators, do certify that *A. B.* did this day, at — in the county of — before us conduct himself in an insolent and disorderly manner, (or as the case may be) tending to insult, disturb and interrupt us in the trial of a certain cause wherein *J. D.* is plaintiff and *U. W.* defendant; for which offence we have fined the said *A. B.* the sum of — dollars, which sum you are hereby required to collect according to law.

Witness our hands this — day of — in the year of our Lord

A. B.
C. D. } Arbitrators."
E. F.

Which certificate shall be transmitted to an alderman, or a justice of the peace, who is hereby required to make a record thereof, and to collect the same in the manner that debts under five dollars thirty-three cents are by law collected; which sum when recovered and collected shall be paid by such justice to the county treasurer, for the use of the proper county where the offence may have been committed.

SECT. XXII. *And be it further enacted by the authority aforesaid,* That it shall be the duty of the prothonotaries of the respective counties, to transmit to the secretary of the commonwealth, in the month of *December* annually, a correct statement of the number of cases referred under this act, classed under their proper title, the number of awards made by arbitrators, and the number of appeals from such awards, and the reversal thereof classed as aforesaid; which statements the secretary shall lay before the legislature.

SECT. XXIII. *And be it further enacted by the authority aforesaid,* That in all cases where a reference has been had under the act of assembly passed the twenty-ninth day of *March* one thousand eight hundred and nine, entitled "A supplement to an act entitled an act to regulate arbitrations and proceedings in courts of justice," and from the report of the referees either of the parties has entered an appeal, and has entered bail for the prosecution of said appeal, but the

recognisance may not have been taken in the terms prescribed by that act, the said neglect shall not be judged a hindrance or bar to the prosecution of said appeal, but the same shall be prosecuted in and such bail shall be liable at the termination of the appeal according to the true intent and meaning of his recognisance.

SECT. XXIV. *And be it further enacted by the authority aforesaid*, That the fees to be allowed to constables or other persons to carry the provisions of this act into operation shall be the same as the fees allowed by law to constables for similar services, and the like penalty inflicted for neglect of duty.

SECT. XXV. *And be it further enacted by the authority aforesaid*, That the arbitrators respectively shall receive the sum of one dollar for each and every day necessarily spent by them in the investigation of any cause to them submitted under the provisions of this act, but they shall receive no daily pay or other compensation, unless they make their report and transmit the same to the prothonotary within seven days after they shall have agreed upon the same.

SECT. XXVI. *And be it further enacted by the authority aforesaid*, That in case any one or more arbitrator or arbitrators chosen and notified as aforesaid shall neglect or refuse to attend and take upon him or themselves the duties of their appointment, each of them so offending shall for every such offence forfeit and pay the sum of two dollars, to be recovered by either party before an alderman or a justice of the peace, in the same manner as debts of equal amount are by law recoverable, unless he or they can satisfy such alderman or justice that his or their absence was occasioned by sickness or some other unavoidable cause.

SECT. XXVII. *And be it further enacted by the authority aforesaid*, That the prothonotaries are hereby authorised and empowered to administer the oaths or affirmations required by this act to prove the service of notices and obtain appeals.

SECT. XXVIII. *And be it further enacted by the authority aforesaid*, That the act to regulate arbitrations and proceedings in courts of justice, passed the twenty-first day of March one thousand eight hundred and six, and the act supplementary

thereto, passed the thirteenth day of *April* one thousand eight hundred and seven, and a further supplement thereto passed the twenty-fourth of *March* one thousand eight hundred and eight, shall be, and the same are hereby rendered perpetual, any thing in said acts to the contrary notwithstanding.

SECT. XXIX. *And be it further enacted by the authority aforesaid,* That after this act shall come into operation, so much of any law or laws as is or are hereby altered or supplied, be, and the same is hereby repealed.

JOHN WEBER,
Speaker of the house of representatives.
P. C. LANE,
Speaker of the Senate.

APPROVED, the nineteenth day of *March* one thousand eight hundred and ten. SIMON SNYDER.

PENNSYLVANIA, ss.

*Office of the Secretary of the Commonwealth,
Lancaster, March 29, 1810.*

I DO CERTIFY, to all whom it may concern, that the foregoing is a true copy of the original law remaining on file in the said office. Witness my hand the day and year aforesaid.

JAMES TRIMBLE, Deputy Secretary.

District Court of Pennsylvania.

JANUARY, 1809.

United States *versus* Cave.

[DUTIES. FORFEITURE. The *proviso* in the fifty-seventh section of the "act to regulate the duties and tonnage," 4 L. U. S. 374, does not protect from forfeiture goods which are found concealed on board, after the master has declared that the whole cargo is discharged.]

PETERS, District Judge.

THIS was an action of debt against the master of the schooner *Two Brothers*, to recover a penalty of five hundred dollars under the 57th section of the impost law, the goods on board not agreeing with the report or manifest delivered by the defendant at the customhouse, inasmuch as twenty-five bags of coffee, not reported, were found by the inspectors concealed in the vessel, some days after the master had declared that the whole cargo was discharged.

The disagreement was clearly proved at the trial, under such circumstances as excluded every idea that it arose from *accident* or *mistake*. But Mr. *Condy*, the counsel for the defendant, contended, that as the goods had never been landed until they were seized and sent to the customhouse by the inspectors, the penalty by virtue of the *proviso* to the section of the act of congress on which the suit was founded, could not be inflicted. After a general answer from Mr. *Dallas*, the jury gave a verdict for the *United States*, subject to the opinion of the court on the point of law. The case was then argued before the judge, who delivered the following opinion:

PETERS, J. The point to be determined by the court arises on the meaning and construction of the fifty-seventh section of the "act to regulate the duties on imposts and tonnage."

Twenty-five bags of coffee were found hidden on board the schooner *Two Brothers*, whereof the defendant was master, not included in the manifest delivered at the customhouse, after seven bags had been before discovered under similar circumstances; for which latter a post-entry had been permitted, a caution given to the master that he must enter all on board, and asseverations by him that there were no others in the vessel. The whole circumstances were attended with strong suspicious appearances. But it is unnecessary to detail them, as the jury have passed upon the facts, and satisfied themselves, and I must add, to the satisfaction of the court, so far as it has any opinion to give in that part of the case. I shall, however, detach my mind from such considerations, so, nevertheless, as to regard what is necessary to developing the intention of the act, and its spirit and meaning. For, though true it is that penal statutes are to be construed strictly, yet equally true is it, that "such construction ought to be put upon a statute as does not suffer it to be eluded." 6 *Bac. Ab.* 391. and authorities cited.

The question here is as to the twenty-five bags of coffee "not agreeing with the report or manifest delivered by the master" to the collector; that is, they were not contained in it, but concealed on board, and not delivered till the vessel was thought to be unladen, and the inspecting officer had left her. The penalty of five hundred dollars is indisputably incurred, unless saved by the proviso in the fifty-seventh section.

It is insisted on by the counsel for the defendant, that the fact of their being so found on board (no matter what was the intent of the master) is sufficient to acquit him, under one of the provisos or savings in the 57th section, from being amenable to the penalty imposed thereby. No construction is to be given to this (as it is contended) out of the very words; under the rule of interpretation of penal statutes. Now these words are, "Provided it *shall be made appear* to the satisfaction of the collector, &c., or, in case of trial for the said penalty, to the satisfaction of the court, that *no part whatever* of the goods, wares or merchandize of such ship or vessel has been un-

shipped, landed or unladen, since it was taken on board, except as shall have been specified in the said report or manifest, and pursuant to permits as aforesaid." It appears to me then, that the *very words* of this proviso, in the strict construction contended for, do not relate merely, and cannot reasonably, or on any rule of construction be confined, to the goods which shall happen to be found on board. The law certainly could not be so construed, with any rational attention to the intent of the legislature. And it is also a rule in the interpretation of all statutes, (penal as well as others) that they shall be so construed as to effectuate the intention of the legislature. It requires no further or other proof to satisfy the collector or court that these goods were not at the time of discovery "*unshipped*," &c. than that of their being actually on board. But proof is expressly required, when it is discovered that "the goods on board do not agree with the manifest" to satisfy the collector or court that not only *these goods*, but that "*no part whatever* of the goods, &c. of such ship or vessel, has been landed," &c. clearly, in my opinion, embracing all other goods of the ship, and throwing (from the necessity of such suspicious cases) the proof on the party, that *no goods*, others as well as those discovered, had been landed, &c. If this construction is deemed *strict*, it is certainly warranted by the doctrine contended for as to penal statutes. But it appears to me not to be a rigid or forced construction. It is one perfectly in conformity with the rule before mentioned, to wit, that "the construction shall be such as not to suffer the statute to be eluded." And nothing could open a wider field for frauds and evasions, than that the very fact which creates strong suspicions of other violations having been committed, should be established by the legislature as an excuse, not only for the one in which the party was detected, but as a protection against a penalty imposed to compel proof that there had been no smuggling of other parts of the cargo. This would seem like "a-saving in an act contrary to the body of it," (1 *Rep.* 47. c.) which lord *Coke* declares to be void. It would be almost as extraordinary (I do not mean any personal allusions) as would be a law for punishing theft, but excusing

a felon caught with the mainor, that is, with the goods in his hands, because he had not parted with them, though perhaps from want of opportunity, and permitting him to escape on delivery of them to the owner.

So here, a post-entry is to wipe away all the penalty, if the goods not being landed is not enough, and free the party from all obligations of proving what the law, in cases of disagreement of the cargo on board with the manifest delivered, requires. This never could have been the legislative intention. Should this view of the subject be deemed irrelevant, the construction of the proviso contended for by the counsel, who always makes the best defence his case admits, would at any rate give every encouragement and means of "*eluding the statute,*" to those inclined to defeat the objects of the law. Among these objects evidently are those comprehended in the provisions which enforce the necessity of returning fair and true accounts of all goods, not only then on board, but of furnishing proof when required as to those which had been "*any part whatever* of the goods of such ship or vessel." No proof whatever has been adduced to make it appear, that there were in the vessel or *had been* no goods landed, since they were taken on board, other than those entered, and those discovered after such entry. The captain's *declarations* on this subject have been proved to be false, by the testimony of witnesses and the discovery of the goods. I am, therefore, of opinion, that neither the words nor manifest intention of the proviso relied on, justify the defence set up in this cause, in point of law, and of course judgment must be entered for the *United States*.

Circuit Court of the United States.

District of Pennsylvania, 1809.

PATENT RIGHT.

Oliver Evans versus John Weiss.

THIS was an action on the case for a violation of the plaintiff's patent right, and came on upon the following case agreed:

The plaintiff being the inventor of the improvements in the manufacture of flour hereafter mentioned, and the patent right for the same by him heretofore obtained having been declared by the court void in the action of the said *Evans* against *Chambers*, and the time for which the said patent was granted having also run out, an act of congress, entitled an act for the relief of *Oliver Evans*, was passed on the 21st of *January* 1808; in consequence of which the said *Oliver* duly obtained letters patent, bearing date the 22d of *January* 1808; notice whereof was given to the defendant in *February* last.

On the 7th of *May* 1802, during the continuance of the former patent, the defendant purchased of the plaintiff a right to use the said improvement at his mill on *Wissahiccon* creek in *Philadelphia* county, in this district, for one wheel and pair of stones; but prior to the passing said act of congress he had applied and used, and continues to apply and use, the same improvements for two wheels and two pair of stones in the same mill. The question submitted is whether the defendant is liable for damages for the use of said improvements, in application to this second wheel and pair of stones, since the act of the 22d of *January*, and whether if so he is liable before notice from the plaintiff. If the opinion of the court be in favour of the plaintiff, judgment to be entered generally, and amount to be adjusted afterwards by the attorneys.

Judge *Washington* delivered the opinion of the court.

It is contended by the plaintiff, that the defendant is liable for using the plaintiff's improvement, in application to the second wheel and pair of stones, since the 22d of *January* 1808, or at all events since the time when the defendant received notice of the plaintiff's patent; because the proviso in the act passed on the 21st of *January* 1808 for the relief of *Oliver Evans* extends only to cases of improvements erected for use or used prior to the passage of said law, and does not protect the defendant from damages for using, after the issuing of the patent under this law, an improvement erected prior thereto.

On the other side it is insisted, that such a construction would render this an *ex post facto* law, and consequently repugnant to the constitution. To avoid which it should be so construed as to connect with the use of the improvement the erection of it, subsequent to the grant of the patent.

Although the court at the last term and upon the first argument, felt strongly inclined to give it the construction contended for by the defendant; yet upon further reflection, we are satisfied that we should do a violence to the words, which no rule of construction would warrant.

The words of that proviso are, "that no person, who shall have used the said improvement, or have erected the same for use before the issuing of the said patent, shall be liable to damages therefor." That is, shall be liable for having erected *or* for having used the improvement at any time prior to the patent. But with respect to the use of it after the issuing of the patent, no protection whatever is afforded against the claim for damages under this law.

The next inquiry is, does the general law give to the plaintiff a right of recovery against a person who erected a machine prior to the issuing of a patent to the first inventor of it, and who afterwards made use of the same.

The act of the 17th of *April* 1800, which as to this point is the only law in force, declares that if any person without permission from the inventor shall make, devise, use or sell the thing whereof the exclusive right is secured to the patentee,

he shall pay three times the damage sustained by the patentee, to be ascertained by a jury. Now, whatever doubts might have existed as to the meaning of the words "devise and use" in the 5th section of the act of 21st of February 1793, thus connecting the using with the devising of the improvement, there can be none under the 3d section of the act of 1800, which repeals the whole of the 5th section of the old law.

It is plain that the *using* of the improvement invented by another and secured by patent is of itself an offence, no matter at what time such improvement was devised or made. Whether the word "devise," which has been a good deal criticised, is synonymous with *make*, as one of the plaintiff's counsel seemed to think, or means to *invent*, a mere act of the mind, a construction which, whether it be to make, or to *contrive*, to *plan*, *form* or *design*, it is unnecessary in this case to decide; because the charge against the defendant is the *using* of the plaintiff's improvements, unconnected with the making or devising it.

But it is objected to this construction, that it would render the law *ex post facto* in its operation, in respect to one who has erected his improvement prior to the granting of the patent to the plaintiff.

It must be admitted that cases of great hardship may occur, if, after a man shall have gone to the expense of erecting a machine, for which the inventor has not then and never may obtain a patent, he shall be prevented from using it by the grant of a subsequent patent and its relation back to the patentee's prior invention. But the law in this case cannot be termed *ex post facto*, or even retrospective in its operation, because the general law declares beforehand that the right of the patent belongs to him who is the first inventor, even before the patent is granted; and therefore any person, who, knowing that another is the first inventor, yet doubting whether that other will ever apply for a patent, proceeds to construct a machine, of which it may afterwards appear he is not the first inventor, acts at his peril, and with a full knowledge of the law, that by relation back to the first invention a subsequent patent may cut him out of the use of the machine thus erected,

Not only may individuals be injured by a liberal construction of the words in the law, but the public may suffer, if an obstinate or negligent inventor should decline obtaining a patent, and at the same time keep others at arms' length, so as to prevent them from profiting by the invention for a length of time, during which the fourteen years are not running on. But all these hardships must rest with congress to correct. It is beyond our power to apply a remedy. No such hardships exist in this case, where the defendant erected the improvement with a knowledge not only that the plaintiff was the first inventor, but had absolutely obtained a patent, although it was afterwards declared invalid.

The circumstances of this case render it unnecessary to give an opinion as to the right of a first inventor, after patent obtained, to recover against one who believing himself to be the first inventor, constructs a machine or improvement upon the principles of his new invention, or uses the same after such patent issued.

Upon the point of notice, we think that the act of 1808 being a private act, the defendant is liable only from the time he received notice of the law.

Judgment for plaintiff.

The People v. Frothingham.

LIBEL ON GENERAL HAMILTON.

New York, November 25, 1799.

DAVID FROTHINGHAM was indicted for publishing in the *Argus* of the 6th inst. a libel against *Alexander Hamilton* esq., late secretary of the treasury of the *United States*, and now inspector and major-general in the armies of the said *United States*.

The substance of the charges in the indictment were, that with a design to injure the fame and reputation of general *Hamilton*, and to expose him to public hatred and contempt, and to cause it to be believed that he was hostile and opposed to the republican government of the *United States*, the defendant had published a libel in which it was alleged that general *Hamilton* was at the bottom of efforts to purchase the *Aurora*; that Mrs. *Bache* had refused to sell her paper, in consequence of the said effort, because, in the hands of general *Hamilton* or his agents, it would be employed injuriously to republicanism. Secondly, that the libel insinuated, and intended to cause it to be suspected, that general *Hamilton*, while secretary of the treasury, had corruptly speculated. And lastly, that the libel insinuated, and intended to cause it to be suspected, that Mr. *Liston* the *British* minister and general *Hamilton* were united in a design to purchase the *Aurora*; and that for the execution of this design general *Hamilton* had received from the *British* minister secret service-money from the king of *Great Britain*. And that this partnership with Mr. *Liston* in the purchase of Mrs. *Bache's* paper was to answer corrupt purposes of the *British* monarch.

The counsel on the part of the prosecution were the attorney and the assistant attorney-general; Messrs. *Brockholst* and *Edward Livingston* were concerned for the defendant. The cause was however managed on the one side by the attorney-general, and on the other side by Mr. *B. Livingston*. It is not possible in sketches of this kind to do justice to the ability and ingenuity that were displayed by the counsel on either side; to prove the publishing of the paper charged as a libel the assistant attorney-general was examined. He said that in consequence of a letter he had received from general *Hamilton*, which has been published in our paper of the 8th inst.; from a desire to avoid directing a prosecution against a widow, he called on Mrs. *Greenleaf* and informed her, that if she would point out the real editor or conductor of her paper he alone should be made responsible for the offence. That Mrs. *Greenleaf* denied that she was at all concerned in the management or direction of her press. That she introduced the defendant as the person who was accountable for whatever was printed under her name. That after hearing from the assistant attorney-general the object of his visit; and after having examined the libel mentioned in the indictment, the defendant said he expected no one but himself was answerable for the publication.

The attorney-general had stated to the jury in opening the cause, that he would not avail himself of the law which prohibited the defendant from giving in evidence the truth of the libel; he now challenged the defendant to shew, that there was room even to suspect that any part of the offensive publication was true. The defendant's counsel having declined to do this, general *Hamilton* was offered as a witness on the part of the prosecution: First, to explain some of the innuendos in the indictment: and secondly, to prove that every part of it was false. He was objected to by the defendant's counsel, who in the agreement on this point, as well as at several other times in the course of the trial, was so candid as to acknowledge that they did not pretend to have any testimony whatsoever

as to the truth of the allegations in the publication charged as a libel; and that for his own part he did believe it a mere fabrication!

The court admitted general *Hamilton* to explain the innuendos, but declared, that the law not allowing the truth or falsehood of a libel to be controverted on a trial for that offence, they would exclude all testimony as to these points on either side, notwithstanding any consent of the counsel. The defence, which was managed by Mr. *B. Livingston*, with no less address and ingenuity than was expected from his well known abilities, consisted in maintaining that Mrs. *Greenleaf* ought to have been the person prosecuted for the libel, if it was one, and not the defendant, who was only her journeyman; and secondly, that the publication was no libel. The charge was given by his honour Mr. justice *Radcliff*. After cautioning the jury against the influence of party-spirit in a case so apt to excite it, he stated to them in substance that this was a prosecution under the common law of our country, by which we and our ancestors had been governed from the earliest times. That according to that law he who published a writing, a printing, or even a picture, tending to expose a man to hatred, contempt or ridicule was guilty of the offence charged against the defendant. So that the inquiry of the jury would be, whether the piece mentioned in the indictment was calculated to expose general *Hamilton* to the hatred and contempt of his fellow-citizens; and if it was, whether the defendant had published it. That by innuendos, the indictment had explained the offensive publication to mean to insinuate that general *Hamilton* was not a republican, that he had corruptly speculated while he was secretary of the treasury, and that he was in league with the *British* minister, and received money of the *British* king for purposes inimical to that form of government which was adopted by the *United States*, and which by the constitution was guarantied to each particular state.

That words might mean more than they expressed, and that it was the business of an innuendo to give or explain the whole or true meaning. That the jury were to judge from a due consideration of the publication, whether such was the

case in this indictment; whether the innuendos expressed the meaning of the publication, as it would be taken by men of common understanding. That upon this subject the court were unanimous, and had no doubt. They were of opinion that the innuendos were just; and that the matter was libellous. And upon the second point also, the judge was as explicit in his charge, that the defendant, even as a journeyman, was liable to the prosecution. But there could be no doubt after the explicit manner in which he had assumed all responsibility.

The jury after being out about two hours, returned with a verdict of *guilty*.

OPINION

By Judge *Winchester* on the operation of the Act of Congress,
5th of *June* 1794.

THE owners of the privateer *Unicorn*, falsely called *Sansculotte Laveaux*, if liable to punishment in the *United States*, can only be prosecuted on the act of congress of the 5th of *June* 1794, by the third section of which law it is provided, "that if any person shall within any of the ports, harbours, bays, rivers, or other waters of the *United States*, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any prince or state" to commit hostilities upon nations 'with whom the *United States* are at peace, such offence is declared to be a high misdemeanor, and subjects the party convicted to a fine not exceeding 5000 dollars, and imprisonment not exceeding three years.

The offence designated by this law was, anterior to the passage thereof, a high offence against the sovereignty of the *United States*, and in contravention of the law and usages of independent neutral nations. But the difficulties which must ever exist in a government of limited and specified powers, in applying the punishment to the infraction of a law which created no specific penalty, as well as the doubts on the question, where does the sovereignty (as applied to the government) of the *United States* reside? induced the necessity of providing by an ordinary act of legislation for the punishment of such cases.

The owner of the *Unicorn* must therefore be considered as having violated a civil law of the *United States* and will incur its penalties on a conviction according to the accustomed form of judicial proceeding. The evidence to establish his guilt must be of affirmative acts corresponding to the provisions of the law, to wit: that the equipment was *within the United*

States; that he caused such equipment to be made, or was knowingly concerned in it. And lastly, that the intent of the equipment was to commit hostilities on nations with whom the United States are at peace. The evidence must be disclosed in court before a jury of the country who are to be his judges. The sentence of the general Laveaux would not be admissible in our courts, inasmuch as he was not a party in the proceeding, and because according to our law it would be the highest iniquity to bind a man by a sentence which he had not the opportunity to controvert; besides it passed on a different question. On that trial there was no question as to the infraction of a civil law of this country. The same evidence which would be sufficient for the conviction of the owner would be enough to convict Americans concerned with him.

J. WINCHESTER.

Baltimore, Jan. 16, 1796.

Question. Is the owner of the ship *Unicorn* responsible for the piracies and robberies exercised by his captain upon neutral vessels? Are there any laws of the *United States* which sanction that responsibility, and can he be prosecuted on those grounds?

Answer. Under the particular circumstances of this case, I am inclined to think that the owner of the *Unicorn* cannot be prosecuted criminally as for piracy and robbery. As a *French* citizen, transiently within the *United States*, he owed nothing but obedience to the laws of order and good government within the nation. He remained a *French* citizen, and although there may have been flagrant outrages committed on neutral vessels, they could only be considered as civil trespasses resulting from acts which were to them unlawful, as being an excess of the authority under which they acted.

There is no particular law of the *United States* on the subject. The only responsibility which exists is to answer in damages for the injury sustained. These can only be recovered by actions to be commenced by the individuals whose property was attacked and injured.

J. WINCHESTER.

February 12, 1796.

Opinion on a Question of Alienage,

By A. MACDONALD, Attorney-General and afterwards Lord Chief Baron of the Exchequer.

QUESTION 1. Is a person, born before the declaration of *American* independence, (a minor on the 4th of *July* 1776), born within the *British* dominions in *America*, now territory belonging to the *United States*, who has exercised [not official] civil functions as a citizen [not as an officer] of said states, and resided *occasionally* in *England* and in those states since the peace, an alien to the *British* crown, and liable to the regulations of the late alien bill.

Question 2. A native of the late *British* dominions in *America*, born before the declaration of the independence of the *United States*, has resided in *England* for *three years* past: During a part of that time his wife, a natural born subject of this realm before the date of *American* independence, and a native of the now *United States*, resided with him in *England* till *May* 1790. In that month she went to *America*. In *July* last she returned hither to her husband. Are they aliens? Is either liable to the operation of the alien act?

The opinion of Mr. *Macdonald*, (now chief baron of the exchequer), signed 18th *January* 1793.

The considerations involved in these questions are of such great extent and magnitude, I do not pretend to be capable of offering an opinion upon them in the course of so short a time (ten days) as has been allowed me, that can be satisfactory even to myself. My present opinion however is, that whatever may be the case with some persons born in the *American* states before the separation, yet that all such persons are not to be deemed aliens. Some authorities countenance the opinion that none are aliens, as may be seen *Co. Reports* 7. fol. 27. § 2.

Faughan 273, at least in the case of kingdoms separated by descent. It is however difficult to conceive, that after a solemn compact of separation in the case of hostilities between two countries so circumstanced, persons born before the separation should be considered as traitors, which would be a consequence of their being considered natural born subjects.

From what passed in the court of the exchequer in a recent case, where it was necessary to ascertain what part of a ship's company were to be deemed Americans and what English, it seemed to be the opinion of the court that it was to be inferred from evidence of the whole conduct of the party and the circumstances attending his continuing to reside in the United States after the separation, whether he were to be deemed to be English or American,⁽ⁱ⁾ and that the jury was to determine it as a point of fact, and that evidence of the mere fact of continuing to reside in America without taking the oath to that government ^(h) would not of itself be conclusive evidence that a natural born subject had elected ^(l) to become a subject of America, as that might be for reasons not inconsistent with an intention to continue his former allegiance. Whether any Americans of the United States, born before the separation, are aliens or not, has not been directly determined on, nor decided by any of our courts. It was however considered, in the case above alluded to, that some are not. It would require therefore a very minute description of all the circumstances attending the residence of the persons mentioned in the questions, as well in the United States, as those attending their coming into and residence in this country, to determine whether they had respectively placed themselves under the American government or meant to continue their former allegiance. Upon the facts stated, I am of opinion that, "supposing an election to accede to the American government to be necessarily attended with becoming aliens here, there is not sufficient evidence that

(i) This is a high and formal sanction of the doctrine of election.

(h) Here the king of Great Britain's attorney-general expressly recognised in 1793 the doctrine of election to be found in English law.

(l) All naturalized seamen take the oath to the United States, and if any man has never taken the oath he is not deemed a citizen.

they have so done, and therefore that they are not proper objects of the late act of parliament."

(Signed) A. MACDONALD.

This opinion of the attorney-general was to affect persons who, if foreign, would claim the protection of their government. On this important opinion some interesting observations arise. The *English* alien law partakes of the character of a penal statute. The oath of abjuration of the king of *Britain* would certainly have determined Mr. *M'Donald*; for he seems to have no doubt about the *right of election*. This oath all naturalized seamen take. The oath of allegiance to the *United States* would have produced the same effect on his judgment. This also the naturalization laws require. Both these oaths are much more than exercising *civil* functions. They give to the *fact* of election the utmost substance. These oaths are *avowals* before *God* and man, with the ceremonies of religion in due form of law, that the person naturalized intentionally elects to put off one allegiance and to take upon him another. It is matter of record and official certificate. The *avowal* of becoming and being an *American* subject is not only a real election, but it is the most deliberate, the most formal, the most solemn, the most binding, and the most effectual election.

DUELLING.

Court of King's Bench.

[There are some parts of this *Christian country*, where the following excellent sentence pronounced by a judge in *Ireland* should be read with shame and confusion of face. When the laws of the *United States* against this crying sin of the land, shall be as well executed as it seems they are in that country, we may hope to see a check put to a practice which degrades us below the rank of savages. After a few duellists shall have been hanged, the sense of honour which leads bullies to blood will be blunted, and we shall find less of the manners of the cutthroat and more of the gentleman and the christian.]

DUBLIN, *February 13, 1809.*

*The King at the prosecution of Colonel H. Browne, against
Manus Blake, esq.*

THE defendant being brought up for judgment, Mr. justice *Day* addressed him to the following effect:

“Mr. *Manus Blake!* You have been tried and found guilty upon an information granted against you for challenging colonel *Henry Browne* to fight a duel with you, and for endeavouring by opprobrious and insulting language to provoke that gentleman to send you a challenge; and you now stand at the bar a convicted criminal, awaiting the judgment of the law. From the report of the learned judge, who tried this information at the last assizes of *Galway*, it appears, that on the 9th of *April*, armed with a sword, you met and stopped colonel *Browne* in the public street of *Eyre-court*, and addressed him

in the following words: "You have offended me, and I never before had an opportunity of speaking my mind to you, from your superiority of command. I am now come here for the express purpose of demanding gentlemanly satisfaction and a meeting." And upon the prosecutor's declining (as he ought) to meet you, and reminding you of what no virtuous and amenable subject can ever forget, that the laws of the land are fully competent to the redress of every injury, you replied by calling him "a coward and a poltroon," and using other expressions no less shocking to the feelings of a gentleman.

"Thus, sir, you stand convicted of a deliberate design to take away the life of a fellow-creature, of a long-harboured purpose to commit murder. For, give it what specious name you please, it is not fashion, nor a false and mistaken sense of honour, nor still the cry of the worthless and the profligate, which can change the eternal and immutable nature of the deed: the laws of the land as well as the law of *God* pronounce a homicide, committed in a cold-blooded deliberate duel, to be murder. Nay, so strong and sacred a fence has the law cast round the life of man, that the mere discharging (though without effect) a loaded pistol at another, with a deliberate intent to kill or wound him, is a felony of death; whether it be by a base assassin skulking in cowardly concealment behind a hedge, or by an open and manly duellist exposing himself in equal and mortal combat, it is a capital crime in the combatants and all their aiders and abettors, the law giving them full credit for the murder which they meditate. The positions (however plain and acknowledged) of the crown law, it seems not unnecessary at this time to retrace upon the public mind, because of certain compromising relaxations which appear of late to have crept into the subject, and which it behoves this the supreme court of criminal jurisdiction to mark with its most decided disapprobation.

"This crime, in the abstract, of the first magnitude, stands highly aggravated in your case. The offence which you conceived against your prosecutor was, because he presumed, as the superior officer of your regiment, to call you to an account

for professional delinquency. Had that gentleman so far forgot his public duty as to have stooped to accept your invitation, he would have been indeed the contemptible "coward and poltroon" which you were pleased to style him; through a dastardly and mean fear of ignorant obloquy, he would have forfeited the esteem of every virtuous, wise and enlightened individual in the community. What must be the condition of every professional character in the country, if he shall hold himself personally responsible for the manly and firm discharge of duty, often painful, always imperiously cast upon him by his situation? What, for instance, would become of our profession; what become of the suitor, whose interest and rights are identified with those of our profession, if a barrister, the minister of truth and justice, shall not be at liberty to unmask, in strong and appropriate language, iniquity and fraud? if an advocate, the ornament and delight of the bar, shall cease to feel himself at perfect liberty, without the risk of vulgar, crazy contumely, to hold up to public abhorrence the oppressor's wrong? What would become, sir, of your late profession; what would become of the country, whose existence depends upon the condition and temper of the army, if a military commander must balance for a moment between personal security and a vital trust, in which the dearest interests of the state are deeply involved. The plain consequence would be, the triumph of bold and daring guilt; every ruffian would tread down the laws with impunity; our boasted tribunals would be superseded, and the sword become the arbiter of right and wrong. The inevitable consequence would be, a fatal relaxation in those great and proud establishments created as indispensable for our protection; in our military force, whose vital principle is strict and inflexible subordination, without which an army is but a rabble, a host of tumultuary and ferocious janizaries, the derision of their enemies, and formidable only to those who pay them; that subordination and discipline by which, not less than their unconquerable constancy and courage, the *British* army achieved the glories and the wonders of the late campaign.

"Sir, it is necessary to teach you, and through you to teach the country, whose characteristic stain is a propensity to this offence, that a spirit of duelling is not to be tolerated in any country pretending to civilization, but must be beat down by the strong arm of the law.

"The sentence of this court is, that you be imprisoned for six calendar months, and till you find security, yourself in the sum of 500*l.* and two sureties in 250*l.* each, to be of the peace and good behaviour for seven years."

REVIEW OF OLMSTEAD'S CASE.

The whole proceedings in the case of *Olmstead* and others v. *Rittenhouse's* executrices, as contained in documents on record in the courts of the *United States* and *Pennsylvania*; together with the act of the legislature of the state of *Pennsylvania* and other matters in relation to this important subject. Collected and arranged by *Richard Peters*, jun. *Philadelphia*: Published by *William P. Farrand* and Co. 1809.

Report of the case of the commonwealth of *Pennsylvania* versus *John Smith*, esquire, marshal of the *United States*, for the district of *Pennsylvania*. Containing the speeches of the attorney-general and *Jared Ingersoll*, esq. on behalf of the commonwealth, and *William Lewis*, esq. on the part of the defendant. And also the opinion of the honourable *William Tilghman*, esq. chief justice of the state of *Pennsylvania*. By a member of the bar of *Philadelphia*. *Philadelphia*: Published by *David Hogan*, 1809.

A report of the whole trial of General *Michael Bright* and others, before *Washington* and *Peters*, in the circuit court of the *United States*, in and for the district of *Pennsylvania*, in the third circuit; on an indictment for obstructing, resisting, and opposing the execution of the writ of arrest, issued out of the district court of *Pennsylvania*, in the case of *Gideon Olmstead* and others, against the surviving executrices of *David Rittenhouse*, deceased. By *Thomas Lloyd*. The arguments of counsel, and charge of the judge revised by each respectively. *Philadelphia*: Printed for *P. Byrne*, 1809.

ON the 25th of *November*, 1775, congress passed an act for the purpose of erecting tribunals of admiralty jurisdiction. The fourth section of this act provides, "that it be and is hereby recommended to the several legislatures in the united colonies as soon as possible to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury under such qualifications, as to the respective legisla-

tures shall seem expedient;" and the sixth section provides that, "in all cases an appeal shall be allowed to the congress or such person or persons as they shall appoint for the trial of appeals," &c.

On the 9th of *September* 1778, the state of *Pennsylvania* established an admiralty court. The trial by jury was introduced, and the act provided that "the finding of the jury shall establish the facts without re-examination or appeal." Sect. 6. The 7th section provides that "in all cases of captures an appeal from the decree of the judge of admiralty shall be allowed to the continental congress or such person or persons as they may from time to time appoint," &c.

The *British* sloop *Active* was captured on the high seas in *September* 1778, by *Gideon Olmstead* and others, and brought into the port of *Philadelphia*, where she was libelled in the court of admiralty, held before *George Ross*, esq. the then judge. *Olmstead* and the others claimed the whole vessel and cargo exclusively. But *Thomas Huston*, commander of the brig *Convention*, a vessel of war belonging to the state of *Pennsylvania*, claimed a moiety for the state, himself and crew; and *James Josiah*, master of the sloop *Gerard*, a private vessel of war, claimed for himself, owners and crew, a fourth part, leaving a fourth for *Olmstead* and his associates. The ground of the two latter claims was, that the *Gerard* and the *Convention* were in sight at the time of the capture and before hostilities between *Olmstead* and the crew of the *Active* had ceased.

On the (4th or) 15th of *November* 1778, the libels were tried before a jury, and a verdict was rendered, in which no facts were found, by which each of these claims were recognised and allowed. Not being satisfied with this distribution, *Olmstead* appealed from the decision to the court of appeals established by congress, in 1777; and on the 15th of the ensuing month, the decree of judge *Ross* was reversed, and the whole decreed to the appellants. The judge refused to obey this reversal, because the case had been tried before him by a jury, and paid a moiety of the net proceeds of the prize into the treasury of *Pennsylvania*, taking a bond of indemnity from *David Rittenhouse*, the treasurer.

The court of appeals thereupon ordered it to be entered on record, that the judge and marshal of the admiralty had absolutely refused obedience to their decree, that they were unwilling at that critical juncture in the public affairs to enter upon any proceedings for contempt, but that they would not hear any appeal until their authority should be so settled as to give full efficacy to their decrees and process.

This court consisted of the honourable *Oliver Ellsworth*, late chief justice of the *United States*, the honourable *William Henry Drayton*, formerly chief justice of the state of *South Carolina*, and *William Ellery* and *John Henry, jun.*, both of whom were also eminent lawyers. They laid a statement of the whole proceedings before congress, which was referred to a committee of five, who, in a brief report, at once luminous, logical, and comprehensive, demonstrated the powers of congress and the jurisdiction of the court of appeals. They argued,

“That no act of any one state can, or ought to, destroy the right of appeal to congress, in the sense above declared.

“That congress is, by these *United States*, invested with the supreme sovereign power of war and peace.

“That the power of executing the law of nations is essential to the supreme sovereign power of war and peace.

“That the legality of all captures on the high seas must be determined by the law of nations.

“That the authority, ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace.

“That a control by appeal is necessary, in order to compel a just and uniform execution of the law of nations.

“That the said control must extend as well over the decisions of juries as judges, in courts for determining the legality of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations, in all cases of captures; and might at any time exercise the same in such manner as to prevent the possibility of being controlled; a construction which involves many inconveniences

and absurdities, destroys an essential part of the power of war and peace, intrusted to congress, and would disable the congress of the *United States* from giving satisfaction to foreign nations, complaining of a violation of neutralities, of treaties, or other breaches of the law of nations; and would enable a jury in any one state to involve the *United States* in hostilities; a construction, which, for these and many other reasons, is inadmissible.

"That this power of controlling, by appeal, the several admiralty jurisdictions of the states, has hitherto been exercised by congress, by the medium of a committee of their own members.

"*Resolved*, That the committee, before whom was determined the appeal from the court of admiralty, for the state of *Pennsylvania*, in the case of the sloop *Active*, was duly constituted and authorised to determine the same.

"*Resolved*, That the said committee had competent jurisdiction to make thereon a final decree, and therefore their decree ought to be carried into execution."

The third resolution contained a request to the legislature to appoint a committee to confer upon the subject with a committee of congress. Instead of complying, the legislature haughtily passed an act, 29th *November* 1779, directing *George Ross*, esq. to pay over the whole proceeds to *David Rittenhouse*, captain *Houston* and captain *Josiah*.

We next find *Olmstead* in the common pleas of *Lancaster*, suing the executors of judge *Ross*, where he obtained a judgment by default; in consequence of which the executors instituted an action against *Rittenhouse*. This case is fully reported in 2 *Dallas* 160. The judges delivered their opinions *seriatim* in favour of the defendants.

Here the case rested until the year 1802, when *Olmstead* and his associates, relying upon a decision in the supreme court of the *United States*, 3 *Dallas* 54., that the district courts of the *United States* have authority to carry into execution the decrees of the court of appeals, appointed by congress under the old confederation, filed his libel in the district court of *Pennsylvania*. In this libel they prayed that Mrs.

Sergeant and Mrs. Waters, daughters and executrices of Mr. *Rittenhouse*, might be cited to appear and produce an account of the moneys received by their father from the sale of the *Active*, and finally to abide by the future order, &c. The decree of judge *Peters*, 14th *January* 1803, was in favour of the libellants. No application, however, was made to that court for peremptory process against the respondents for some years. *Olmstead* had made many ineffectual appeals to the legislature.

On the 31st of *January* 1803, *Thomas M'Kean*, the then governor of the state, sent a message to the legislature in consequence of this decree, which he transmitted. By the ingenuity exercised in this business, says governor *M'Kean*, "an act of congress," "an act of the general assembly of the state," and "a verdict of a jury" are held for nought: by a strained construction, the treasurer of the state is converted into a stakeholder, and a sentence given in favour of the libellants, without any summons, notice to, or hearing of the commonwealth of *Pennsylvania*, the other only real party, &c.

Such is the language of the governor in this message. To his conduct, as has been observed, may be traced all the difficulties which have occurred. The governor seems to have forgotten that in admiralty proceedings all persons are parties, and that therefore the state was a party even without notice. If a party does not condescend to intervene for his interest, the court will let him take the consequences of his obstinacy. It is untrue that the state had no notice, if we may credit judge *Peters*, who is corroborated by the internal evidence which is furnished by this very message. Judge *Peters* says, "the governor on every occasion, and the attorney general often, as I was led to believe, had repeated notice, during the pendency of the suit; not only through the real party respondents, [the executrices] but on one occasion, and one is sufficient to repel this charge if there were no others, the attorney-general came into court, accompanied by the counsel for the respondents, and it was desired by the latter in his pre-

sence, that no proceedings should be had, until the meeting of the legislature; and this request was granted. The reason assigned for this request was, that the delay would enable the governor, to whom intelligence was then *agreed* to be given, to lay the matter before the legislature. *Peters, J. on awarding the attachment.*

In *Rhode-Island*, appeals were expressly prohibited in cases where there had been a trial by jury. And yet this same governor *M^r. Kean* did sit as president of the court of appeals in the case of the schooner *Two Brothers*, and signed the decree of reversal of a decree rendered upon the verdict of a jury in the state court!

I cannot omit noticing another inconsistency in judge *M^r. Kean*. When the 2d section, article 3d of the constitution was under discussion in the convention of *Pennsylvania*, and it was inferred that the trial by jury was not secured, he observed that "it was a subject of amazement to him, to hear gentlemen contend that the verdict of a jury should be without revision in all cases. Juries are not infallible because they are twelve in number. When the law is so blended with the fact, as to be almost inseparable, may not the decision of a jury be erroneous?" And yet in *Olmstead's* case, a verdict of a jury was held to be of such importance that it could not be revised!

An act was passed, 2d of *April* 1803, authorizing the governor to direct the attorney-general to demand the money from the executrices or to bring suit against them in case of their refusal. The governor was also authorized "to protect the just rights of the state, in respect of the premises, by any further means or measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said *Elizabeth-Sergeant* and *Esther Waters* from any process whatever issued out of any federal court, in consequence of their obedience to the requisition" made by the attorney-general, and also "in the name of this commonwealth to give" them "a sufficient instrument of indemnification."

On the 29th of *May* 1807, *Mrs. Sergeant*, and *Mrs. Waters* filed a suggestion in the district court, reciting this act at length. They further stated, that being required by the pro-

per authority to pay into the treasury the moneys admitted to have been received as executrices of *David Rittenhouse*, in manner aforesaid, they had paid the same into the treasury. That the money came to the hands of Mr. *Rittenhouse* as the treasurer, as appears by his bond, and that the decree of the court was pronounced, so far as respected the rights and jurisdiction of the state *ex parte* and without jurisdiction. This was the first intimation that was ever made to the court of the claim on behalf of the state.

Compulsory process against the executrices was then demanded on behalf of *Olmstead*, but judge *Peters*, being fearful of embroiling the government of the *United States* and that of *Pennsylvania*, and being desirous of having his own opinion corroborated by that of the supreme court of the *United States*, refused to grant it: and alleged these reasons, *inter alia*, in his return to a mandamus issued from that tribunal.

At the *February* sessions, 1809, this return was argued, and a peremptory mandamus was ordered.

On the 27th of *February* 1809, *Simon Snyder* the governor of *Pennsylvania*, sent a message to the legislature, informing that body of the peremptory mandamus, and that he was making arrangements to call out a portion of the militia in order to protect the persons and property of the executrices, against any process which might be issued in consequence of the mandamus. On the same day he issued his orders to *Michael Bright*, a militia general, directing him to call out a portion of the militia.

The senate and lower house immediately passed resolutions on the subject, the tendency of which was to inflame the minds of the people and strengthen the seeds of rebellion which had been sowed by governor *M^cKean* and were now nurtured by his successor.

On the 24th of *March* 1809, the marshal received the attachment against the persons of the executrices, and on the 25th he was prevented from serving the process by the soldiers of *Bright*. On the 15th of *April*, the marshal eluded the vigilance of these redoubtable *protectors* and executed his

process upon Mrs. *Sergeant*. On the 17th a writ of *habeas corpus* was issued from the supreme court of *Pennsylvania* upon the petition of Mrs. *Sergeant*, directed to *John Smith* the marshal, commanding him to shew cause, &c., why Mrs. *Sergeant* should not be released. The marshal returned the writ of attachment from the district court, and the chief justice decided that the party was legally detained in custody. In consequence of this decision the money was paid to *Olmstead* and Mrs. *Sergeant* released from custody.

The next step in this business was the arrest of *Bright* and his associates, who had so ably defended "the just rights of the state" against the marshal. At the *April* term 1809 they were indicted under the twenty-second section of the act of congress of *April* 1790, in the circuit court for the district of *Pennsylvania*, for obstructing the process of the court. It is scarcely necessary to add that they were found guilty. *Bright* was sentenced to an imprisonment of three months and a fine of two hundred dollars. The sentence pronounced upon his companions, eight in number, was, one month's imprisonment and fifty dollars' fine each.

This very important conflict has at length been terminated in the complete triumph of the laws and the utter defeat and mortification of those who, from ignorance or obstinacy, opposed their execution. For several years past the councils of *Pennsylvania* have been managed by mischievous minds. Not only their legislative body, but the great mass of the people have nourished a spirit of hatred towards the wholesome provisions of the common law, generally, and to the federal judiciary, in particular, which has justly excited the fears of all well disposed men. We have shewn in the preceding narration that the honour of originating this rebellion belongs to governor *M'Kean*; but he had an able coadjutor in the person of his successor, who being known to be an honest pains-taking mechanic was elevated to the gubernatorial chair. Reasonable men, those who regarded the union of these states as the anchor of political safety, and the supremacy of the laws as the trident by which every thing dear was to be protected, shuddered at the sight of a powerful state arrayed in arms, under

the sanction of legislative authority, to oppose the execution of a judicial decision. That the seat of this insurrection should have been in the streets of our largest city: that in the face of day the marshal of the district should be braved by eight obscure men of no influence, no consideration in society, headed by a man in no respect, scarcely, their superior: that he should have been obliged to scale the fence of a back yard and, weasel-like, steal into a house to serve his process, when he should have put himself at the head of the body of the district—these circumstances throw a deeper shade on the melancholy picture which we now contemplate. Although it may not be strictly within the subject, we cannot help saying that they add one more to the many arguments against the removal of the seat of government to this place. The archives of our public documents and the persons of our rulers would not be safe, where a rebellion against the laws can be supported by nine men. The political as well as moral principles of the community must be sadly corrupted, if the marshal dare not crush the ostensible opposition by the power of a *posse comitatus*. For the honour and the safety of the city we could have wished that the attachment had been publicly served. It would have been a terror to others in like case offending. Justice does not enforce her decrees by stealth. She delights in the noon-tide glare of day, where every action can be scrutinized.

The first of the abovementioned pamphlets is, as its title imports, a mere transcript from the records of the different courts in which *Olmstead* endeavoured to obtain his money and other papers connected with the business.

The second contains what appears to be a very imperfect report of the arguments before chief justice *Tilghman* on the *habeas corpus*. From our personal knowledge of the gentlemen who argued the case we are confident that great injustice has been done to them, and we shall therefore take "no note" of what is here "set down to them," that we may have the more room for the perspicuous opinion of the chief justice.

" If I order Mrs. *Sergeant* to be discharged, it must be because the court of the *United States* has proceeded in a case in which it had no jurisdiction. If it had jurisdiction, I have no right to inquire into its judgment or interfere with its process. But the counsel of *Olmstead* have brought forward a preliminary question, whether I have a right to discharge the prisoner even if I should be clearly of opinion, that the district court had no jurisdiction. I am aware of the magnitude of this question, and have given it the consideration it deserves. My opinion is, with great deference to those who may entertain different sentiments, that in the case supposed I should have a *right* and it would be my *duty* to discharge the prisoner. This right flows from the nature of our federal constitution, which leaves to the several states absolute supremacy, in all cases in which it is not yielded to the *United States*. This sufficiently appears from the general scope and spirit of the instrument.

" The *United States* have no power, legislative or judicial, except what is derived from the constitution. When these powers are *clearly* exceeded, the independence of the states, and the peace of the union demand that the state courts should, in cases brought properly before them, give redress. There is no law which forbids it; their oath of office exacts it, and, if they do not, what course is to be taken? We must be reduced to the miserable extremity of opposing force to force, and arraying citizen against citizen; for it is vain to expect that the states will submit to *manifest* and *flagrant* usurpations of power by the *United States*, if (which God forbid) they should ever attempt them. If congress should pass a bill of attainder, or lay a tax or duty on articles exported from any state, (from both which powers they are expressly excluded,) such laws would be null and void, and all persons who acted under them would be subject to actions in the state courts. If a court of the *United States* should enter judgment against a *state* which refused to appear in an action brought against it by a citizen of another state, or of a foreign state, such judgment would be *void*, and all persons who act under it would be *trespassers*. These cases appear so plain that they

will hardly be disputed: it is only in considering doubtful cases that our minds feel a difficulty in deciding; but, if in the plainest case which can be conceived, the state courts may declare a judgment to be *void*, the principle is established. But while I assert the power of state courts, I am deeply sensible of the necessity of exercising it with the greatest discretion. Woe to that judge who rashly or wantonly attempts to arrest the authority of the *United States*; let him reflect *again and again* before he declares that a *law* or a *judgment* has no validity. The counsel for Mrs. *Sergeant* have with great candor and propriety, admitted, that when there is *reasonable cause* for *doubt*, that doubt should be decisive in favour of the judgment in question. The same principle has been adopted by the judges of the supreme court of the *United States*, and of our own state, when questions concerning the validity of laws have come before them, and it has my hearty approbation.

“Having disposed of the preliminary question, I will now consider the point of jurisdiction. If the district court had no jurisdiction, it must either be on account of the *subject* of the suit, or the *persons* who were *parties*. I will examine them separately. The *subject* is a matter of prize, which arose before the adoption of the present constitution. By the 2d section of the 3d article of the constitution, the judicial power of the *United States* extends “to all cases of admiralty and maritime jurisdiction.” These expressions comprehend all cases which *had* arisen or which *should* arise; and it was no doubt the intent to comprehend them; because otherwise, all antecedent cases would have been left unprovided for. I believe this construction has universally prevailed, nor has it been questioned in the course of the argument in this case. It appears then, that the *subject* of the libel is directly within the jurisdiction of the court, being a matter of *admiralty* jurisdiction. It is unnecessary for me to give any opinion concerning the right of the old court of appeals to reverse the decision of juries, contrary to the provisions of the act of assembly of *Pennsylvania*, under which the state court of admiralty was instituted. That is the point which occasioned so much jealousy and heartburning between several of the states and the old

congress; it divided the opinions of many men of unquestionable talents and integrity, and certainly was a question of no small difficulty.* But the state of *Pennsylvania* having ratified the present constitution, did thereby virtually invest the courts of the *United States* with power to decide this controversy. They have decided it, and being clearly within their jurisdiction, I am not at liberty to consider it as now open to discussion. The supreme court of the *United States* has more than once decided, that the old court of appeals had the power to reverse the verdicts of juries, notwithstanding the law of any state to the contrary. From the establishment of this principle, it irresistibly results, that *Gideon Olmstead* and his associates were entitled to the whole proceeds of the *Active* and her cargo, and may pursue them into whatever hands they have fallen, unless indeed they have fallen into the hands of persons not subject to an action in the courts of the *United States*. This leads me to the question concerning the *parties* to the suit, the only question which has appeared to me to be of real difficulty, and which I was pleased to hear argued with great force and candor by the counsel for Mrs. *Sergeant*. It is declared by the 11th article of the amendments of the constitution, that 'the judicial power of the *United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the *United States*, by citizens of another state, or by citizens or subjects of any foreign state.' The record in this case shews a suit between citizens of *Connecticut* and citizens of *Pennsylvania*. It is therefore not within the words of the amendment. But it is contended, that although not within the words, it is within the spirit, because the suit is brought against persons representing an officer of the state, who received the property in question for the *use* of the state. There is weight in the observation, that the inconvenience would be very great, if the plaintiff in any action might by an *evasion*, by substituting the *officer* of the state in the place of the *state*, compel the state to abandon its property or contest it in the courts of the *United States*. In a case so circumstanced, the argument would be very powerful against the jurisdiction of the federal courts.

But I cannot say, judging from the facts judicially disclosed to me, (which are all that I can judge from) that the present case is so circumstanced. The certificates were certainly paid to Mr. *Rittenhouse*, as treasurer of the state. But it is equally certain, that neither he nor his representatives since his death, did deposit them in the treasury of *Pennsylvania*; on the contrary, they were invested by him in a new fund in his own name, and it appears by his written memorandum, that he did not consider them as the property of the state, but his own property, until the state should give him a certain indemnification, which was never given. If this evidence is not strong enough to shew that the certificates and money were not in the *possession* of the state, it acquires an additional strength, difficult to resist, from the circumstances stated in the answer of *Elizabeth Sergeant* and *Esther Waters*, "that they had refused to deliver them to the treasurer of the state, although expressly required so to do." Whether the conduct of Mr. *Rittenhouse* and his executrices was right or wrong is not the point now to be inquired into. The fact is that they did *withhold* the certificates and interest money from the treasury, until after the final decree of the district court. Their paying it afterwards cannot affect the question of jurisdiction. How then does the case stand? The *property* of these certificates and interest money was irrevocably vested in *Olmstead, &c.*, by the decree of the former court of appeals, which the supreme court of the *United States*, since the adoption of the present constitution, has decided to be conclusive. The possession was not in the state, and the suit was not brought against the state or any of its officers. I do not see then how it can be maintained, even under a liberal construction of the 11th article of the amendments, that the *state* was a *party* to the suit in the district court. Several acts and resolutions of the legislature of *Pennsylvania* were read in the course of the argument, concerning which I am not called upon to decide. I exercise the right in common with my fellow-citizens, of speaking my sentiments on political occurrences in private conversations, but it would ill become me on *this occasion* to

express any opinion concerning the policy which the state has thought proper to pursue. Whatever they have done, I extend to them the same charity which I ask for myself, the belief that they have acted from *pure motives*. But although I say nothing concerning the policy of the government, I may be allowed, without impropriety, to express my anxious hope, that this long continued controversy will be brought to a termination without any material interruption of that harmony between this state and the *United States* so essential to the prosperity of both.

"On the whole of this case, I cannot say that it clearly appears to me, that the district court of the *United States* made its decree in a cause of which it had no jurisdiction. I must order therefore that Mrs. *Sergeant* remain in the custody of the marshal."

The third and most important is the trial of *Bright*. The great point was the jurisdiction of the court of appeals, and the discussion of it necessarily involved a review of the whole proceedings. The prosecution was opened by Mr. *Dallas*, the district attorney. Mr. *Dallas* says that "the constitutions of the union and of the state must be regarded and construed as instruments formed and executed by the same party, the sovereign people, delegating powers to different agents, but upon the same trusts and for the same uses."

Governor *M'Kean*, who laid the coal to the combustible materials of which this state is composed, and his successor, who fanned it, were either ignorant of this important truth or wilfully shut their eyes against its force. Had they attended to it they never would have put the people in opposition to laws of their own creation. It was in 1787 that the people of *Pennsylvania* gave their solemn sanction to a constitution which they declared should be "the supreme law of the land," and in the year 1790 that they committed the exercise of minuter powers to a government more nearly connected with themselves. There are no powers in these instruments at variance with each other; on the contrary, there is a very nice harmony between them and a commendable caution may be

observed in the latter constitution not to infringe upon the former. The framers of the former were aware of the absurdity of erecting an *imperium in imperio*; they knew that if *Pennsylvania* wished to avail herself of the protection which the union afforded, she must *submit* to the restrictions of the federal compact. No man has a right to enter my doors and give orders to my domestics. *Pennsylvania* entered the old league of the *British* provinces in order to aid in resisting *British oppression and tyranny* and be protected. She then resigned all powers, which are incident to a sovereignty, to congress. The first and most important prerogative of sovereignty is that of executing the laws of nations, and among those laws are to be found the principles upon which the lawfulness of captures upon the high seas are determined. This state adopted the resolution of *November 1775* so far as to erect an admiralty court, but she did not go further and provide that "in all cases an appeal shall be allowed to the congress." Congress then very properly say, it is our right to establish these tribunals. We allow you to establish them. But we must exercise a controlling authority in order to preserve a uniformity of decision in the different states, and also that we may be able to answer to other nations for our exposition of the public law. If you adopt part of our resolution you must adopt the whole; if you claim our protection you must submit to our laws.

It may not be amiss to observe here that the surest way to protect the sovereignty of the states from insult and to preserve the confederacy from division, would be to cut up the states into smaller districts. If there were not one larger than *Delaware* we should be safer. As it is now, a combination of three or four states might give laws to all the others. If particular states are permitted to increase in power and their rebellions be so quietly overlooked, our constitution may be sent to the trunkmaker as a

Damn'd paper,

Black as the ink that's on it:—senseless bauble!

To return to the subject. The doctrine of Mr. *Dallas* is to be kept in view throughout this discussion, lest we may be

led astray by governor *M'Kean's* solicitude for the privileges of juries and state independence, or governor *Snyder's* "judicial usurpation," "judicial dictation" and "judicial vengeance."^(m) The idea of original compact will not bear the test when compared with the principles of a free government. All our constitutions emanate from the people: that of the union is expressly said to be "ordained and established" by them. They make no bargain because there is no party with whom they can contract. We do not use the language of the commons to the first *Charles*, "all which they most humbly *pray to be allowed*, as their rights and liberties;"⁽ⁿ⁾ nor, in the more positive tone of a subsequent period, do we "*demand* and insist upon all the premises as our undoubted rights and liberties."^(o) There is no power here *giving* and *granting* "to all, &c. the freemen of this our realm these liberties following,"^(p) &c.

Having shewn that the federal as well as the state government, and that the judicial as well as the legislative and executive organs of each government are the work of the people themselves, the counsel makes some very proper remarks on the necessity of preserving the judicial department from the encroachments of the coordinate departments. We are next presented with a rapid sketch of our national career, in which the constant solicitude of the people to display their sovereignty, to mark the boundary lines of the several departments of the government, and to maintain the judicial authority, is illustrated in a lucid and instructive manner.

A statement of the facts follows; the resistance to the marshal is next proved, and Mr. *Franklin*, the attorney-general for the state, opens the defence. This *speech*, as it is called, would be a very good one, if length were the criterion of excellence. It contains not only almost all the documents inserted in *hæc verba*, but *Blackstone's* celebrated eulogium on the trial by jury, which he had read before without avail to judge *Tilghman*; about a dozen pages from *Vattel* and *Marten*,

(m) See his letter to *Bright*.

(n) 8 Parl. Hist. 150.

(o) 2 Par. Deb. 261.

(p) Magna Charta.

and several tolerably copious extracts from *Dallas's Reports*. Now as Mr. *Peters* had published all the documents, as most lawyers possess *Vattel*, *Marten* and *Dallas*, and can repeat *Blackstone's* eulogium, we really think this pamphlet should have undergone the process of *winnowing*, an art which was once recommended to the compilers of the "*Transactions of the American Philosophical Society*." This process, which, unfortunately for the heads and purses of modern readers, is too little understood, seems to be the more necessary in the present instance, as we really cannot discover any relation between the case of a biscuit baker indicted for resisting an officer of justice, and *Charlemagne* carrying fire and sword through *Saxony*, or *Mahomet* reading the *Koran* in the deserts of *Asia* and *Africa*.(q) It is true we have had something like decrees of councils and papal bulls, and something too like people setting themselves up for judges of the *Inca Athualpa*,(r) without right or ability to perform the task; but we do contend, with all deference to the attorney-general and the reporter of his *speech*, that we could have dispensed with these things in the present form. We lament the insertion of so much extraneous matter the more, because it seems to have prevented the counsel from inserting his argument on those very points where we wished to hear him. For instance, a very important part of the argument is dismissed in this way:

"[Here Mr. *Franklin* went into a full enumeration of the powers granted to congress and those reserved to the several states, and *shewed* that the right [of] appeal not being granted to congress, congress could not legally exercise it.]"

Perhaps we may congratulate ourselves that the constitution itself was not spread upon the record, as well as the instructions to the delegates in the old continental congress, in order to illustrate these powers.

Another point was, that the moment the money came into the hands of Mr. *Rittenhouse*, as treasurer, it was in the coffers of the state; and of Mr. *Franklin's* argument we only learn that he "discussed this point at considerable length, in

(q) Page 85.

(r) Page 82.

order to prove the truth of his position." (p. 61.) After wading through Mr. *M'Kean's* message to the legislature and the whole of the law authorising him "to protect the just rights of the state," we are informed (p. 75.) that Mr. *F.* took up the act of congress, and endeavoured to prove that it could not apply to the defendants. But we are again in the dark as to his manner of proving this position, excepting the extracts from *Marten* and *Dallas* which we have before mentioned, and which are vastly to the point.

We have no desire to place Mr. *Franklin* in a ridiculous light; but as all the speeches are said to be revised by the counsel, we think of the fifty pages which are here given as his speech he should have expunged the forty-five of documents which were already before the public, and irrelevant extracts from very common books. We should then have had some other evidence of the "just rights of the state" than the messages of her own governors and the resolutions or acts of her own legislators.

We rejoice to meet Mr. *Dallas* again (p. 90.) reviewing the evidence and assigning the general reasons in support of his case. His address to the jury is divided into three distinct propositions. He contends,

1st, That the congressional court of appeals had jurisdiction to affirm or to reverse the sentence of the admiralty court of *Pennsylvania* in the case of the sloop *Active*.

2d, That the district court of *Pennsylvania* had jurisdiction to enforce the final decree of the court of appeals, and that such jurisdiction was not affected by the amendment of the constitution, which provides "that the judicial power of the *United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the *United States*, by citizens of another state, or by citizens or subjects of any foreign state."

3d, That the act of assembly of the 2d April 1803 and the orders of the governor of *Pennsylvania* for calling out the militia, afford no justification to the defendants for the commission of the offence with which they are charged in the indictment.

We have not room to follow Mr. *Dallas* through his able, comprehensive and convincing argument. We would not injure it by extracts. It displays the brilliant mind of the rhetorician and the *lucidus ordo* of the pleader. It contains no pernicious doctrines at which the patriot may tremble, but it is throughout the able expounder of the legitimate principles of order and government. (s) Mr. *Dallas* was followed by Mr. *Ingersoll*, who is stated to have been retained by the commonwealth to assist the attorney-general in the defence. It is here that we must seek the substantial grounds upon which the defendants rested. Mr. *Ingersoll* inquires,

1st, Had the federal court jurisdiction in the suit of *Gideon Olmstead* against Mrs. *S.* and Mrs. *W.* to determine on the claims and interests of the state of *Pennsylvania*?

2d, Is the process of a court not having jurisdiction voidable only, or absolutely void; and may it be resisted by force?

These questions, particularly the latter, are discussed with great ingenuity, and the student will derive much instruction from Mr. *Ingersoll's* defence. Mr. *Dallas* made a brief reply.

(s) We speak with the more pleasure of Mr. *Dallas's* exertions in this case, because we rejoice to contemplate a mind which we admire directed to a proper end. We have been censured for the manner in which this gentleman's name was introduced in a former number of this *Journal*, and the displeasure of some was manifested in a more pointed manner than by mere words. To the advice of others the editor will always listen with that respect which becomes his youth and his situation: but those who think so meanly of him as to suppose he will be intimidated from that path which his duty seems to prescribe, by the subtraction of a subscription, will find themselves egregiously mistaken. He is ambitious to amass a Repertory in which the principles, the laws and usages of the country may be found and the genius of her most eminent characters illustrated. At every hazard, the constitution of the country shall be defended, and its rights asserted, and its dignity protected, as far as his feeble powers may enable him to perform so important a duty. The report of the trial of *Naglee* (1 *Law Jour.* 177.) was derived from a source of unquestionable veracity, and the conduct of the district attorney appeared to merit the reprehension which it received. We have no desire to enter into the petty politics of the day, but this was a case of no ordinary import. "The only way," said the gallant *Nelson*, "to argue with a *Frenchman*, is to knock him down." This was *Naglee's* argument, and it were well for us if a portion of his spirit pervaded the splendid palaces at *Washington* and the calmer retreat of *Monticello*.

Judge *Washington* delivered the opinion of the court in the following terms:

"Impressed with the magnitude of the questions which have been discussed, we could have wished for more time to deliberate upon them, and for an opportunity to commit to writing the opinion which we have formed, that it might have been rendered more intelligible to you, and less susceptible of being misunderstood by others. But we could not postpone the charge without being guilty of the impropriety of suffering the jury to separate after the arguments of counsel were closed, or of keeping them together until *Monday*; a hardship which we could not think of imposing upon them. I shall proceed therefore to state to you, in the best way I can, the opinion of the court upon this novel and interesting case. It may not be improper in the first place to refresh your minds with a short history of the transactions which have led to the offence with which these defendants are charged; and to consequences which might have been of serious import to the nation.

"*Gideon Olmstead* and three others, having fallen into the hands of the enemy during the latter part of the year 1778, were put on board the sloop *Active* at *Jamaica* as prisoners of war, in order to be conducted to *New-York*, whither this vessel was destined with supplies for the *British* troops. During the voyage, *Olmstead* and his companions, who had assisted in navigating the vessel, formed the bold design of taking her from the enemy; in which, with great hazard to themselves, they ultimately succeeded. Having confined in the cabin the officers, passengers, and most of the men, they steered for some port in the *United States*, and had got within five miles of *Egg Harbour*, when captain *Houston*, commanding the brig *Convention*, belonging to the state of *Pennsylvania*, came up with them and captured the *Active* as prize. The sloop was conducted to *Philadelphia*, and libelled in the court of admiralty established under an act of the legislature of that state.

Claims were filed by *Olmstead* and his associates for the whole of the vessel and cargo, and by *James Fosiah*, commander of a private armed vessel which was in sight at the

time of the capture by *Houston*, for a proportion of the prize. Depositions were taken in the cause. A jury was impaneled to try it. The question of fact was, whether the enemy was completely subdued or not, by *Olmstead* and his companions, at the time when captain *Houston* came up with them. The jury, without stating a single fact, found a general verdict, for one fourth to *Olmstead* and his associates and the residue to *Houston* and *Josiah*, to be divided according to law and an agreement between them. From the sentence of the court upon this verdict *Olmstead* appealed to the court of appeals in prize causes, established by congress, where, after a hearing of the parties, the sentence of the admiralty court was reversed, the whole prize decreed to the appellants, and process was directed to issue from the court of admiralty commanding the marshal to sell the vessel and cargo, and to pay over the net proceeds to those claimants.

"The judge of the court of admiralty refused to acknowledge the jurisdiction of the court of appeals over a verdict found in the inferior court, and directed the marshal to make the sale and to bring the proceeds into court. This was done, and the judge acknowledged the receipt of the money on the marshal's return. In *May 1779 George Ross*, the judge of the court of admiralty, delivered over to *David Rittenhouse*, treasurer of this state, 11,496*l.* 9*s.* 9*d.* in loan-office certificates issued in his own name, being the proportion of the prize-money to which the state was entitled by the sentence of the inferior court of admiralty. *Rittenhouse* at the same time executed a bond to *Ross*, obliging himself, his heirs, executors, &c. to restore the sum so paid, in case *Ross* should, by due course of law, be compelled to pay the same according to the decree of the court of appeals. In the condition of this bond, the obligor is described as being treasurer of the state, and the money is stated as having been paid to him for the use of the state. Indents were issued to *Rittenhouse* on the above certificates, and these were afterwards funded in the name of *Rittenhouse* for the benefit of those who might eventually appear to be entitled to them.

"After the death of *Rittenhouse* these certificates, together with the interest thereon, came to the hands of Mrs. *Sergeant* and Mrs. *Waters*, his representatives. The papers which covered the certificates were indorsed in the handwriting of Mr. *Rittenhouse*, with a memorandum declaring that they will be the property of the state of *Pennsylvania* when the state releases him from the bond he had given to *George Ross*, judge of the admiralty, for paying the fifty original certificates into the treasury as the state's share of the prize. No such release ever was given. The certificates thus remaining in the possession of the representatives of *Rittenhouse*, *Olmstead* filed his libel against them in the district court of *Pennsylvania*, praying execution of the decree of the court of appeals. Answers were filed by these ladies, but no claim was interposed, nor any suggestion made of interest on the part of the state, and in *January* 1803 the court decreed in favour of the libellants.

"On the second of *April* in the same year the legislature of *Pennsylvania* passed a law authorising the attorney-general to require Mrs. *Sergeant* and Mrs. *Waters* to pay into the treasury the moneys acknowledged by them in their answer in the district court to have been received, without regard to the decree of that court; and in case they should refuse, that a suit should be instituted against them in the name of the commonwealth for the said moneys. The governor was also required to protect the just rights of the state by any further measures he might deem necessary, and also to protect the persons and properties of those ladies from any process which might issue out of the federal court in consequence of their obedience to this requisition, and further, should give them a sufficient instrument of indemnification in case they should pay the money to the state. No further proceedings took place in the district court for some time after the passage of this law.

"And when, at length, an application was made for process of execution, the judge of that court, with a very commendable degree of prudence, declined ordering it, with a view to bring before the supreme court of the *United States* a question so delicate in itself, and which was likely to produce

the most serious consequences to the nation. Upon the application of *Olmstead* the supreme court issued a *mandamus* to the judge of the district court, commanding him to execute the sentence pronounced by him in that case, or to shew cause to the contrary. The reasons for withholding the process assigned in answer to this writ not being deemed sufficient by the supreme court, a peremptory *mandamus* was awarded.

"It may not be improper here to state, that no person appeared in the supreme court on the part of the state, or on that of *Mrs. Sergeant* and *Mrs. Waters*, and that no arguments were offered on the part of *Olmstead*. The idea which I understand has gone abroad that the *mandamus* was awarded upon the single opinion of the chief justice is too absurd to deserve a serious refutation. No instance of that sort ever did or could occur; and in this particular case I do not recollect that there was one dissentient from the opinion pronounced.

"Process of execution having been awarded by the judge of the district court in obedience to the *mandamus*, the defendant, general *Michael Bright*, commanding a brigade of the militia of the commonwealth of *Pennsylvania*, received orders from the governor of the state "immediately to have in readiness such a portion of the militia under his command as might be necessary to execute the orders, and to employ them to protect and defend the persons and the property of the said *Elizabeth Sergeant* and *Esther Waters*, from and against any process founded on the decree of the said *Richard Peters*, judge of the district court of the *United States* aforesaid; and in virtue of which any officer under the direction of any court of the *United States* may attempt to attach the persons or the property of the said *Elizabeth Sergeant* and *Esther Waters*." A guard was accordingly placed at the houses of *Mrs. Sergeant* and *Mrs. Waters*, and it has been fully proved, and is admitted, that the defendants, with a full knowledge of the character of the marshal of this district, of his business and his commission, and the process which he had to execute having been read to them, opposed with muskets and bayonets the persevering efforts of that officer to serve the writ, and, by such resistance, prevented him from serving it.

"There is no dispute about the facts. The defendants have called no witnesses, and their defence is rested upon the lawfulness of the acts laid in the indictment. They justify their conduct upon two grounds. 1st, That the decree of the district court under which the process was issued was *coram non judice*, and to all intents and purposes void; and 2dly, That though it were a valid and binding decree, still that they cannot be questioned criminally for acting in obedience to the orders of the governor of this state.

"The decree of the district court is said to be void for two reasons; first, because the court of appeals had not power to reverse the sentence of the court of admiralty founded upon the verdict of a jury: and, secondly, because the state of *Pennsylvania* claims an interest in the subject which was in controversy in the district court.

"The first question is, was the decree of the court of appeals void for want of jurisdiction of the case in which it was made? But first let me ask, can this be made a question at the present day before this or any other court in the *United States*? We consider it to be so firmly settled by the highest judicial authority in the nation, that it is not now to be questioned or shaken. The power of the court of appeals to re-examine and reverse or affirm the sentences of the courts of admiralty established by the different states, though founded upon the verdicts of juries, was first considered and decided in the case of *Doane v. Penhallow*, in the supreme court of the *United States*. The jurisdiction of that court to reexamine the whole cause, as to both law and fact, was considered as resulting from the national character of an appellate prize court, and not from any grant of power by the state from whose court the appeal had been taken. The right of the state to limit the court of appeals in the exercise of its jurisdiction was determined to be totally inadmissible. The same question was considered by the supreme court upon the motion for the *mandamus*, and decided to be settled and at rest. If it were necessary to give further support to the authority of these cases, the opinion of the supreme court of *Pennsylvania* in *Ross's executors v. Rittenhouse*, and the unanimous opinion

of the old congress, with the exception of the representatives of this state and one of the representatives of *New-Jersey*, might be mentioned. If reasons were required to strengthen the above decisions, those assigned by the committee of congress upon the case of the *Active* are believed to be conclusive.

“ But I think it will not be difficult to prove that the law of *Pennsylvania* passed on the ninth of *September* 1778, establishing a court of admiralty in that state, neither by the terms of it nor by a fair construction of its meaning, was intended to abridge the jurisdiction of the court of appeals in cases like the one under consideration. The words are, “ that the jury shall be sworn or affirmed to return a true verdict upon the libel according to evidence; and the finding of the jury shall establish the facts without reexamination or appeal.” The obvious meaning of this provision was, that if the jury found the facts upon which the law was to arise, those facts were to be considered as conclusive by the appellate court, and not open to reexamination by the judges of that court; the legislature thinking it, no doubt, most safe to entrust the finding of facts to a jury of twelve men. But what was to be done if the jury found no facts, as was the present case? If the appellate court were precluded from an inquiry into the facts, affirmance of the sentence appealed from would be inevitable. This absurdity then followed: in *all cases* it was necessary to impanel a jury to establish the facts, and in *all cases*, without exception, the party thinking himself aggrieved might appeal. But in every case where the jury chose to find a general verdict the sentence appealed from must of necessity be affirmed. I cannot believe that this was the meaning of the legislature; and I do not think that the words of the law will fairly warrant such a construction.

“ Let me then put the question seriously to the jury: Will they have the vanity to think themselves wiser than all those who have passed opinions upon this important *question of law*? And will they undertake to decide that those opinions were erroneous? Miserable indeed must be the condition of that community where the law is unsettled and decisions upon the

very point are disregarded, when they again come, directly or incidentally, into discussion. In such a state of things good men have nothing to hope and bad men nothing to fear. There is no standard by which the rights of property and the most estimable privileges to which the citizens are entitled can be regulated. All is doubt and uncertainty until the judge has pronounced the law on the particular case before him; but which carries with it no authority as to a similar case between other parties.

"But suppose, for a moment, against the settled law upon the point, that the court of appeals had not a power to re-examine the verdict of the jury in the case of the *Active*, and on that account that the decree of the district court in opposition to that of the court of admiralty was erroneous, it does not therefore follow that the district court had no jurisdiction of the case on which this process issued. If erroneous, it could only be reexamined and corrected in a superior court. But if the subject depended upon a question of prize or no prize; it was completely within the cognizance of the district court by the constitution and laws of the *United States*; the former of which grants to the federal courts, and the latter to the district courts, *cognizance of all civil causes of admiralty and maritime jurisdiction*. This is such a cause; and we consider that circumstance to be decisive of the first point. We are happy upon this occasion, as we are upon all others, to coincide in opinion with the learned and respectable gentleman who presides in the supreme judiciary of this state.

"The next ground of objection to the jurisdiction of the district court is, that the state of *Pennsylvania* claimed an interest in the subject in dispute between the parties to that cause.

"The amendment to the constitution upon which this question occurs declares that "the judicial power of the *United States* shall not be construed to extend to any suit in *law or equity*, commenced or prosecuted against one of the *United States*, by citizens of another state, or by citizens or subjects of any foreign state." It is certain, that the suit in the district court was not commenced or prosecuted against the state of

Pennsylvania. She was in no respect a party to that suit. But, it is contended, that under a fair construction of this amendment, if a state claims an interest in the subject in dispute, the case is not cognizable in a federal court. In most cases it will be found that the soundest and safest rule by which to arrive at the meaning and intention of a law, is to abide by the words which the lawmaker has used. If he has expressed himself so ambiguously that the plain interpretation of the words would lead to absurdity, and to a contradiction of the obvious intention of the law, a more liberal course may be pursued. But if upon any occasion the strict rule should be observed, it ought to be in expounding the constitution; although I do not mean to say that even in that case this rule should be inflexible. Every reason is opposed to the construction contended for by the defendants' counsel; and, to our apprehension, there is not one sound reason in favour of it. If the title to the thing in dispute be in the state, and this is made to appear to the court, it is inconceivable that the plaintiff should recover so as to disturb that right. But if he should recover, the state would not be bound by the judgment, not being a party to it. This is by no means a new case. If one individual obtains a judgment or decree against another, the interest of a third person, not a party, will not be bound or prejudiced by the decision; but he may, nevertheless, assert his right in a court of justice against the party in possession of the property to which he claims title. The state cannot be forced into court, but she may come there, if she pleases, in pursuit of her rights, and will no doubt do so upon all proper and necessary occasions.

"But if, on the other hand, the mere claim of interest by a state in the subject in dispute between two citizens can have the magic effect of suspending all the functions of a court of justice over that subject, and of annihilating its decrees when pronounced, this effective and necessary branch of our government, and of all free governments, may be rendered useless at any moment, at the pleasure of a state. If the suit be prosecuted against a state, the court perceives, at once, its want of jurisdiction, and can dismiss the party at the threshold.

But if a latent claim in the state, not known, perhaps, by any of the litigant parties, is sufficient to oust the jurisdiction, to annul the judgment when rendered, and to affect all the parties concerned, with the consequences of carrying a void judgment into execution, the federal courts may become more than useless: they will be traps, in which unwary suitors may be ensnared to their ruin. To illustrate this position, the district attorney mentioned many very strong and very supposable cases. I will add one other. *A.* sues *B.* for a debt, or for property either real or personal in his possession. Conscious that he must pay the money or lose his possession, in consequence of the unquestionable title of his adversary, *B.* pays over the money, or conveys the property even pending the suit to a third person for the use of the state, and by this operation arrests the further progress of the suit, or avoids the judgment, whenever it shall pass. A doctrine so unjust, and big with consequences so alarming, and so fatal to the general government, should have strong and unequivocal words to support it. The court would be very mischievously employed in supplying them. We should convert this amendment, this sacrifice made to state pride, into an engine to demolish altogether one of the essential branches of the general government.

“To this branch of the argument, therefore, the answer is short, but conclusive. The state is not a party, and she has no interest in the subject in dispute in the district court. The decree of the court of appeals extinguished the interest of *Pennsylvania* in any share of the *Active* and her cargo, and vested the full right to the whole in *Olmstead* and his associates, who might rightfully follow that part of the proceeds which came into the hands of the representatives of *Rittenhouse*, who held them as stakeholders for whoever might have title to them. *Rittenhouse* himself held them in his private capacity, and not as treasurer, for his individual security against the bond given to *Ross*, and which was still outstanding when this decree was rendered. I know not how this part of the subject can be made plainer.

"There is another objection to the argument drawn from the interest of the state, which was not satisfactorily answered by Mr. *Ingersoll*, to whom it was stated by the court during the discussion. By the constitution of the *United States* the judicial power extends to all controversies between a state and citizens of another state, whatever might be the nature of the controversy, and no matter as to the court to which the cause might be assigned by the legislative distribution of the judicial powers. That amendment declares that the above provision shall not be construed to extend to any suit in *law or equity* commenced or prosecuted against a state by a citizen of another state, or an alien. This was not *a suit at law, or in equity*, but in a court of the law of nations, and in a case of admiralty and maritime jurisdiction. The question put to the learned counsel was, "Is such a case excluded from the cognizance of the district court by this amendment?" The answer given was, that the amendment ought to be so construed, this case being equally within the mischief meant to be remedied: that is, the court is bound to supply the words "or to cases of admiralty and maritime jurisdiction." Would we be justified by any rule of law in admitting such an interpolation, even if a reason could not be assigned for the omission of those words in the amendment itself? I think not. In our various struggles to get at the spirit and intention of the framers of the constitution, I fear that this invaluable charter of our rights would, in a very little time, be entirely construed away, and become at length so disfigured, that its founders would recollect very few of its original features. But there appears to be a solid reason for the limitation of the amendment to cases at law and in equity. And this will throw some light upon the preceding branch of this argument. Suits at law and in equity cannot be prosecuted against a state without making her a party, and the judgment acts directly upon her. But in what manner was the execution to be made effectual? The subject was a delicate one, and it was thought best to avoid having it practically tested. But in cases of admiralty and maritime jurisdiction the property in dispute is generally in the possession of the court, or of persons bound to produce it, or its

equivalent, and the proceedings are *in rem*. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree. All the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lie by, and after the decree is passed say she was a party, and, therefore, not bound for want of jurisdiction in the court. This doctrine, in relation to the proceedings of a court of the law of nations, and in which all nations are interested, might be productive of the most serious consequences to the general government, to whom are confided all our relations with foreign governments. As at present advised, then, we think that the amendment to the constitution does not extend to suits of admiralty and maritime jurisdiction.

"The second ground of justification is founded upon the orders of the governor of this state, issued, as it is contended, under the sanction of a law of the state. Whether the true meaning of that law has been mistaken or not, it would perhaps ill become this court to decide; but it will not, I trust, be deemed indecorous if we express a hope that it was so. It is more agreeable to think that an individual should have been mistaken in his judgment (and in this case we are bound to think that the error, if any, was not of the heart) than that the legislature should have intended so open an attack upon the constitution and government of the *United States*. But if such was the design of the law we must lament the circumstance, and must, without reserve, pronounce it to be unconstitutional and void. Upon what is the law predicated? Upon the invalidity of the sentence of the district court. But have the people of the *United States* confided to the legislatures of the states, or even to that of the *United States*, the power to declare the judgments of the national courts null and void? Could such a power be granted to them without sapping the foundations of the government and extinguishing the last spark of *American* liberty? It is a truth not to be questioned, that the power to declare the judgments of your courts void can never be safely

lodged with a body who may enforce its decision by the physical force of the people. This power necessarily resides in the judicial tribunals, and can safely reside no where else. Whether a state court is competent to declare a judgment of a federal court void for want of jurisdiction need not now be considered. It may, however, be observed, that admitting the right in the first instance, the ultimate decision of the question belongs to the supreme judicial tribunal of the nation, if that decision be required; for the judicial power extends to all cases arising under the constitution and the laws of the *United States* made in pursuance thereof; and the twenty-fifth section of the judicial law, with a view to secure to the national judiciary this important privilege, vests in the supreme court a power to review and affirm, or reverse, the decision of the highest court of law or equity in a state, where a question depending upon the construction of any clause in the constitution, treaty or statute of the *United States* had been decided against the title, &c. claimed under the constitution, &c. It seems, however, that this power is considered as being unsafely lodged in the national courts, because it may be abused for the purpose of drawing every case into the vortex of the federal jurisdiction. Whence can arise this jealousy? Have the judges of those courts, or of any courts, an interest in extending the sphere of their jurisdiction? Quite otherwise: as the jurisdiction of the court is abridged, the labour of the judge is diminished. Is it a privilege which is claimed for the advantage of the court or of the individuals who compose it? By no means. It is the privilege of the citizen, and as long as I have the honour of a seat on the bench, I will consider myself one of the guardians of this privilege, (a very feeble one I acknowledge,) and with a steady and unvarying eye, fixed upon the constitution as my guide, I shall march forward, without entertaining the guilty wish to limit this privilege, where the citizen may fairly claim it, or the desire, not less criminal, to enlarge its boundaries, because it is claimed.

“ If then the validity of the decree of the district court be established upon the ground of reason, upon the basis of the

constitution—in part upon the opinion of congress and decisions of the supreme federal and state courts, more than once given, what follows? That the governor of this state had no power to order the defendants to array themselves against the *United States*, acting through its judicial tribunals; and the legislature of the state was equally incompetent to clothe him with such a power, had it so intended. The defendants were bound by a paramount duty to the government of the union, and ought not to have obeyed the mandate. There were but two modes by which the general government could assert the supremacy of its power on this occasion: by the peaceful interference of the civil authority, or by the sword. The first has been tried, and the defendants are now called to answer for their conduct before a jury of their country. Will any man be found bold enough to condemn this mode of proceeding, or complain that this alternative has been chosen? But if the accused can plead the orders of the governor as a justification of their conduct; and if the sufficiency of such a plea is established, the civil authority is done away, its means are inadequate to its end, and force must be resorted to. Are we prepared for such a state of things? The doctrine appears to us monstrous; the consequences of it terrible. We regret that it was broached. It was contended, that in a case where a state government authorises resistance to the process of a federal court, though in a cause wherein the court had competent jurisdiction, the only remedy in such an emergency is negotiation. If there were no federal, no common head, this position might be admitted, and on the failure of the negotiations, the *ultima ratio* must be resorted to. But under our constitution of government, which declares the laws of the *United States* made in pursuance of that instrument the supreme law of the land, and which vests in the courts of the *United States* jurisdiction to try and decide particular cases, I am altogether at a loss to conceive how, in the case stated, negotiations between the general and paramount government, in relation to the powers granted to it and a state government, can be necessary, and could ever be proper. I speak not of the power, but of the right of resistance.

" But it is contended that the defendants, standing in the character of subordinate officers to the governor and commander in chief of the state, were bound implicitly to obey his orders; and that although the orders were unlawful, still the officer and those under his command were justifiable in obeying them. This argument is imposing, but very unsound. In a state of open and public war, where military law prevails, and the peaceful voice of municipal law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there, the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of the country.

" In the case of *Little and Bareme*, the supreme court of the *United States* felt every motive which could affect them as men to excuse an unlawful act performed by a meritorious officer. He was at sea, without the possibility of consulting with counsel, or others, as to the legality of the act he was about to execute, and which appeared to him to be authorised by the chief executive magistrate of the nation in the instructions received from the navy department. Notwithstanding all these powerful pleas in his favour; pleas which were addressed strongly to the feelings of those who were to decide on his case, the supreme court conceived that the law of the land did not warrant the instructions given, and consequently that the officer was not justified in what he did. I am not sure, but I am induced to think that he afterwards obtained relief from congress.

" This is said to be a hard case upon the defendants, because if they had refused obedience to the order of the governor, they would have been punished by the state. I acknowledge it is a hard case; but with this you have nothing to do if the law is against the defendants. It may, however, be observed, that had the defendants refused obedience, and been prosecuted before a military or state court, they ought to have been acquitted, upon the ground that the orders themselves were

means of some encouragement he had met with, took upon him the part of slighting and insulting his lordship on all occasions that proffered. And here he had a rare opportunity; for, in his rude way of talking, and others of a party after him, he battered the poor decree, not without the most indecent affronts to his lordship, that, in such an assembly, ever were heard. His lordship, whose part it was to justify his decree, took not the least notice of any indecency or reflection that regarded him, but made a deduction of the case, and gave his reasons amply, and with calm and exquisite temper. But his decree was reversed. I heard a noble peer say that *he never saw his lordship in so much lustre as he appeared under the ill usage of that day*; and he was more admired than any success of his reasons could have made him. But now having opened this scene, we are not to expect other than opposition, contempt, and brutal ill usage of that chief towards his lordship, while he lived. The earl of *Nottingham's* was printed, but his lordship did not think fit to interest himself in a private cause so far as to become a party in print, although all the chancellor's flourishes were fully answered and resolved. And as for certain scandals and lies, raised and printed by a foul libeller,⁽¹⁾ relating to this cause, I do not think them worth taking notice of.

But as to sir *George Jeffries*, having said so much of his ill usage of his lordship, I think it proper to give some particular account of his character; which I shall for the most part do by annexing some short explanation to his lordship's own notes of him; and those are more explicit of him than of any other person; for all the view of law in *England*, in place and out of place, mustered together, did not so much affect his lordship's quiet as the behaviour of that chief did; of which a just view is presented elsewhere. To take him from his beginning, he was a gentleman's son in *Wales*, of whom it is reported he used to say *George* (his son) *would die in his shoes*. His beginnings at the inns of court, and practice, were low. After he was called to the bar, he used to sit in coffeehouses

(1) The author of the *Lives of the Lord Chancellors*.

and order his man to come and tell him that company attended him at his chamber; at which he would huff, and say, *let them stay a little; I will come presently*. This made a shew of business; of which he had need enough, being married and having several children. One of the aldermen of the city was of his name; which, probably, inclined him to steer his course that way: where, having got acquaintance with the city attorneys, and drinking desperately with them, he came into full business amongst them, and was chosen recorder of the city. That let him into knowledge at court, and he was entertained as the duke of York's solicitor, and was also of the king's counsel. He continued recorder till the prosecution of abhorrrers, and saved himself (as he took it) by composition for his place. Thereupon, having surrendered his recordership, he obtained the place of chief justice of the king's bench; and, after the death of the lord keeper *Guilford*, the great seal, which he held till the prince of *Orange* landed, and then he absconded in disguise, in order to fly beyond sea; but being discovered at *Wapping*, escaped narrowly being torn in pieces by the rabble. He was secured by the lord mayor, and sent to the tower, where he died. The incidents of his life, which I shall take occasion to remember, may aptly be placed against his lordship's notes concerning him.

This method was the direct contrary to what raised him, and, in his following behaviour, he practised: for he became a highflyer for the authority of the mayor and court of aldermen. He was of a fierce, unquiet disposition, and being at first but low himself, could act only among inferiors, whom he instigated to be troublesome; and, like others of ambitious tempers, or, which is nearly the same, necessitous, he put himself into all companies, for which he was qualified, by using himself to drink hard, and so made himself a general acquaintance and some friendships in the city. And, upon this course originally taken, he grounded his pretensions to an interest in the citizens.

Began with a turbulent spirit against the mayor and court of aldermen, taking part with the commons.

Then, being acquainted with Will. Chiffinch, (the trusty page of the back stairs,) struck in and was made recorder.

This Mr. *Chiffinch* was a true secretary as well as page; for he had a lodging at the back stairs, which might have been properly termed the spy-office, where the king spoke with particular persons about intrigues of all kinds: and all little informers, projectors, &c. were carried to *Chiffinch's* lodging.

He was a most impetuous drinker, and, in that capacity, an admirable spy; for he let none part from him sober, if it were possible to make them drunk; and his great artifice was pushing idolatrous healths of his good master, and being always in great haste; *for the king is coming*; which was his word. Nor, to make sure work, would he scruple to put his master's salutiferous drops (which were called the king's, of the nature of *Goddard's*) into the glasses; and being a *Hercules*, well breathed at the sport himself, he commonly had the better; and so fished out many secrets, and discovered mens' characters which the king could never have obtained the knowledge of by any other means. It is likely that *Jeffries*, being a pretender to main feats with the citizens, might forward himself and be entertained by *Will. Chiffinch*, and that which at first was mere spying, turn to acquaintance, if not friendship, such as is apt to grow up between immane drinkers; and from thence might spring recommendations of him to the king, as the most useful man that could be found to serve his majesty in *London*, where was need enough of good magistrates, and such as would not be, as divers were accounted, no better than traitors.

Afterwards the duke's solicitor.

Having once got a footing in court, and found means to hold forth great assurances of future services at large, it is no wonder that he was taken in on that side of the court, that desired such men as would act without reserve, as it was termed. While he was in this post he made a great bustle in the duke's affairs, and carried through a cause which was of very great consequence to his revenue, which was for the right of the pennypost office. It was the invention of one *Docwra*, who put it into complete order, and used it to the satisfaction of all *London* for a con-

siderable time. The duke of *York* was grantee of the revenue of the postoffice; and his council, finding this project of a pennypost turn out so well, and apparently improvable, upon consulting the act, thought the duke had a right to all posts, and, consequently, to that. Thereupon an information, grounded on the post act, was exhibited against *Docwra*, and, upon a trial at the king's bench bar, he was convicted; and ever since the crown hath had the benefit of the pennypost. *Docwra* would not submit himself, but insisted on his right to the last; otherwise it was thought he might have secured to himself a good office, by being commissioner for life to manage that revenue. But his waywardness to the court would not give him leave to be so wise.

It was a cruel thing in *Jeffries* to press so very hard as he did to come over the head of Mr. Justice *Jones*, against whom there was no sort of objection; but, on the contrary, a merit in doing the king justice, in so great and consequential a cause as that against the city was. And, in the end, *Saunders*, the chief justice, being disabled by his apoplexy, *Jones* pronounced that judgment, and expressed the reasons so short and sound, and delivered with that gravity and authority as became the court, and greatness of the occasion. And one, that had a grain of consideration of any thing but himself, and being of the same interest and sentiment, would not have pushed with a flaming violence at court, to the injury of so venerable a person as that judge was. *Jeffries* did not gain his point of him; but matters rested awhile, and the place of chief justice of the common pleas being void by his lordship's promotion to the seal, *Jones* was placed there, which was his advantage, and *Jeffries* took the cushion in the king's bench. This was not the only instance of the unreasonable ambition of *Jeffries*, to the prejudice of deserving men. For he laid his eye on the place of chief justice of *Chester*, which was full of sir *Job Charleton*, than whom there was not a person better qualified for his majesty's favour; an

He aimed at the place of chief justice of the common pleas, after the judgment, in the Quo Warranto, settled to the prejudice of *Jones*, who had served in giving it; and expedient being found by room in B. R. was made so.

old cavalier, loyal, learned, grave and wise. He had a considerable estate towards *Wales*, and desired to die in that employment. But *Jeffries*, with his interest on the side of the duke of *York*, pressed the king so hard that he could not stand it; but sir *Job Charleton* must be a judge of the common pleas, and *Jeffries* at *Chester* in his place, being more *Welshman* than himself. Sir *Job* laid this heavily upon his heart, and desired only that he might speak to the king, and receive his pleasure from his own mouth, but was diverted; as a thing determined. But once he went to *Whitehall*, and placed himself where the king, returning from his walk in *St. James's park*, must pass; and there he set himself down like hermit poor. When the king came in and saw him at a distance, sitting where he was to pass, concluded he intended to speak with him, which he could not by any means bear: he therefore turned short off, and went another way. Sir *Job*, seeing that, pitied his poor master, and never thought of troubling him more, but buckled to his business in the common pleas. And may *Westminster Hall* never know a worse judge than he was.

This his lordship thought ill advised; for he was
Prosecution
of Will. Wil-
liams. speaker of the house of commons, and had signed
 divers matters, as commitments, addresses, votes,
 and such acts as the house thought fit should be done; but if
 they were, as was supposed, criminal in their nature, as libels,
 false imprisonments, &c. no privilege, in strict rigour of law,
 excuseth them. But to prosecute a speaker, in vacation of
 parliament, for what he had done by the order of the house of
 commons in the last session of parliament, was by no means
 gracious, or like to be well taken in any succeeding parlia-
 ment, but tended rather to irritate than reconcile; which was
 more for the king's service. But *Williams* had been sharp
 upon *Jeffries* when he was upon his knees at the bar of the
 house for abhorring, and they were both *Welshmen*: therefore
Williams must be prosecuted.

It may conduce somewhat to the understanding this, to
 relate what I clearly remember. It was the case of *Samuel*
Verdon, a famous *Norfolk* attorney. He was ordered by the

house of commons to be taken into custody, and the warrant signed *William Williams*. The serjeant's men went down and took him; but he, out of an acquired obstinacy, would conform with the messengers in nothing. But, in bringing him up, he would not be prevailed with either to mount or dismount his horse; but forced the messengers at every turn to lift him on and off; and, at the same time, had his clerks taking notes, in order to testify these assaults of his person, for every one of which he intended to bring an action of battery. It so fell out that, as he was upon the road, about midway between *Norwich* and *London*, the parliament was prorogued, by which the warrant ceased, and, after that, the custody was a false imprisonment; and *Verdon* brought his action for it against the messengers, which action was tried at the exchequer bar. The speaker (*Will. Williams*) himself, was the front counsel for the defendants, and *Jeffries* for *Verdon*. *Williams* said much to excuse the men, upon account of their invincible ignorance of the prorogation. Upon that, *Verdon* steps forth, and, *My lord*, said he, *if sir William Williams will here own his hand to the warrant, I will straight discharge these men.* *Jeffries* was so highly pleased with this gasconade of his client, that he loved him ever after; of which *Verdon* felt the good effects, when his learned counsel came that circuit as chief justice; for although many complaints were intended against him, and such as were thought well grounded, yet he came off scot free.

There is one branch of that chief's expedition in the west, which is his visitation of the city of *Bristol*, that hath some singularities, of a nature so strange, that I think them worth my time to relate. There had been an usage among the aldermen and justices of the city (where all persons, even shopkeepers, more or less, trade to the *American* plantations) to carry over criminals, who were pardoned with condition of transportation, and to sell them for money. This was found to be a good trade; but, not being content to take such felons as were convict at their assizes and sessions, which produced but a few, they found out a shorter way, which yielded a greater plenty of the commodity. And that was this. The

mayor and justices, or some of them, usually met at their *tolsey*, (a courthouse by the exchequer,) about noon, which was the meeting of the merchants, as at the exchange at *London*; and there they sat and did justice business that was brought before them. When small rogues and pilferers were taken and brought there, and, upon examination, put under terror of being hanged, in order to which, mittimus were making, some of the diligent officers attending, instructed them to pray transportation, as the only way to save them; and for the most part they did so. Then, no more was done; but the next aldermen in course took one and another, as their turns came, sometimes quarrelling whose the last was, and sent them over and sold them. This trade had been driven for many years and no notice taken of it. Some of the wealthier aldermen, as sir *Robert Cam*, for instance, although they sat in court and connived, never had a man; but yet they were all involved in the guilt, when the charge came over them. It appears not how this outrageous practice came to the knowledge of the lord chief justice, but, when he had hold of the end, he made thoroughstitch work with them; for he delighted in such fair opportunities to rant. He came to the city and told them that *he had brought a broom to sweep them*. The city of *Bristol* is a proud body, and their head, the mayor, in the assize commission, is put before the judge of assize; though, perhaps, it was not so in this extraordinary commission of *oyer and terminer*. But for certain, when his lordship came upon the bench, and examined this matter, he found all the aldermen and justices concerned in this kidnapping trade, more or less, and the mayor himself as bad as any. He thereupon turns to the mayor, accoutred with his scarlet and furs, and gave him all the ill names that scolding eloquence could supply; and so, with rating and staring, as his way was, never left till he made him quit the bench, and go down to the criminal's post at the bar; and there he pleaded for himself, as a common rogue or thief must have done: and when the mayor hesitated a little, or slackened his pace, he bawled at him, and, stamping, called for his guards; for he was general by commission. Thus the citizens saw their

scarlet chief magistrate at the bar, to their infinite terror and amazement. He then took security of them to answer informations, and so left them to ponder their cases among themselves. At *London*, sir *Robert Cam* applied, by friends, to appease him, and to get from under the prosecution, and at last he granted it, saying, *Go thy way; sin no more, lest a worse thing come unto thee*. The prosecutions depended till the revolution, which made an amnesty; and the fright only, which was no small one, was all the punishment these judicial kidnappers underwent; and the gains acquired by so wicked a trade rested peacefully in their pockets.

This, to conclude, is the summary character of the lord chief justice *Jeffries*, and needs no interpreter. And, since nothing historical is amiss in a design like this, I will subjoin what I have personally noted of that man; and some things of indubitable report concerning him. His friendship and conversation lay much among the good fellows and humorists; and his delights were, accordingly, drinking, laughing, singing, kissing, and all the extravagancies of the bottle. He had a set of banterers, for the most part, near him; as, in old time, great men kept fools to make them merry. And these fellows, abusing one another and their betters, were a regale to him. And no friendship or dearness could be so great, in private, which he would not use ill, and to an extravagant degree, in public. No one, that had any expectations from him, was safe from his contempt and derision, which some of his minions at the bar severely felt. Those above, or that could hurt, or benefit him, and none else, might depend upon fair quarter at his hands. When he was in temper, and matters indifferent came before him, he became his fiat of justice better than any other I ever saw in his place. He took a pleasure in mortifying fraudulent attorneys, and would deal forth his severities with a sort of majesty. He had extraordinary natural abilities, but little acquired, beyond what practice in affairs had supplied. He talked fluently, and with spirit; and his weakness was that he could

Not in nature. Turbulent at first setting out. Deserter in difficulties. Full of tricks. Helped by similar friendships. Honesty, law, policy, alike.

not reprehend without scolding, and in such *Billingsgate* language as could not come out of the mouth of any man. He called it *giving a lick with the rough side of his tongue*. It was ordinary to hear him say, *Go, you are a filthy, lousy, knitty rascal*; with much more of like elegance. Scarce a day passed that he did not chide some one or other of the bar when he sat in chancery: and it was commonly a lecture of a quarter of an hour long. And they used to say, *this is yours; my turn will be to-morrow*. He used to lay nothing of his business to heart, nor care what he did, or left undone; and spent in the chancery court what time he thought fit to spare. Many times, on days of causes at his house, the company have waited five hours in a morning, and, after eleven, he hath come out inflamed, and staring like one distracted. And that visage he put on when he animadverted on such as he took offence at, which made him a terror to real offenders; whom also he terrified, with his face and voice, as if the thunder of the day of judgment broke over their heads: and nothing made men tremble like his vocal inflictions. He loved to insult, and was bold without check; but that only when his place was uppermost. To give an instance. A city attorney was petitioned against for some abuse; and affidavit was made that, when he was told of my lord chancellor, *My lord chancellor*, said he, *I made him*; meaning his being a means to bring him early into city business. When this affidavit was read, *Well*, said the lord chancellor, *then will I lay my maker by the heels*. And, with that conceit, one of his best old friends went to jail. One of these intemperancies was fatal to him. There was a scrivener of *Wapping* brought to hearing for relief against a *bummery bond*; the contingency of losing all being shewed, the bill was going to be dismissed. But one of the plaintiff's counsel said he was a strange fellow, and sometimes went to church, sometimes to conventicles, and none could tell what to make of him; *and it was thought he was a trimmer*. At that the chancellor fired; and, *A trimmer!* said he, *I have heard much of that monster, but never saw one. Come forth, Mr. Trimmer, turn you round, and let us see your shape*: and, at that rate, talked so long, that the poor fellow was

ready to drop under him; but, at last, the bill was dismissed with costs, and he went his way. In the hall, one of his friends asked him how he came off. *Came off*, said he, *I am escaped from the terrors of that man's face, which I would scarce undergo again to save my life; and I shall certainly have the frightful impression of it as long as I live.* Afterwards, when the prince of Orange came and all was in confusion, this lord chancellor, being very obnoxious, disguised himself in order to go beyond sea. He was in a seaman's garb, and drinking a pot in a cellar. This scrivener came into the cellar after some of his clients, and his eye caught that face which made him start; and the chancellor, seeing himself eyed, feigned a cough and turned to the wall with his pot in his hand. But Mr. *Trimmer* went out and gave notice that he was there; whereupon the mob flowed in, and he was in extreme hazard of his life; but the lord mayor saved him, and lost himself. For the chancellor being hurried with such noise and crowd before him, and appearing so dismally, not only disguised but disordered; and there having been an amity betwixt them, as also a veneration on the lord mayor's part, he had not spirits to sustain the shock, but fell down in a swoon, and in not many hours after died. But this lord *Jeffries* came to the seal without any concern at the weight of duty incumbent upon him; for, at first, being merry over a bottle with some of his old friends, one of them told him he would find the business heavy. *No*, said he, *I'll make it light.* But, to conclude, with a strange inconsistency he would drink and be merry, kiss and slaver with these bôn companions over night, as the way of such is, and, the next day, fall upon him, ranting and scolding with a virulence insufferable.

SIR EDMUND SAUNDERS,

LORD CHIEF JUSTICE OF THE KING'S BENCH.

[From the Life of Lord Keeper Gifford.]

THE lord chief justice *Saunders* succeeded in the room of *Pemberton*. His character, and his beginning, were equally strange. He was at first no better than a poor beggar boy, if not a parish foundling, without known parents or relations. He had found a way to live by obsequiousness, (in *Clement's-Inn*, as I remember,) and courting the attorneys' clerks for scraps. The extraordinary observance and diligence of the boy made the society willing to do him good. He appeared very ambitious to learn to write; and one of the attorneys got a board knocked up at a window on the top of a staircase, and that was his desk, where he sat and wrote after copies of court and other hands the clerks gave him. He made himself so expert a writer that he took in business, and earned some pence by hackney writing. And thus, by degrees, he pushed his faculties, and fell to forms, and, by books that were lent him, became an exquisite entering clerk; and, by the same course of improvement of himself, an able counsel, first in special pleading, then at large. And, after he was called to the bar, had practice in the king's bench court, equal with any there. As to his person, he was very corpulent and beastly, a mere lump of morbid flesh. He used to say, *by his troggs*, (such a humorous way of talking he affected) *none could say he wanted issue of his body, for he had nine on his back*. He was a fetid mass that offended his neighbours at the bar in the sharpest degree. Those whose ill fortune it was to stand near him, were confessors, and, in summer time, almost martyrs. This hateful decay of his carcase came upon him by continual sottishness; for, to say nothing of brandy, he was seldom without a pot of ale at his nose, or near him. That exercise was all he used; the rest of his life was sitting at his desk, or

piping at home; and that *home* was a taylor's house in Butcher-row, called his lodging, and the man's wife was his nurse, or worse; but, by virtue of his money, of which he made little account, though he got a great deal, he soon became master of the family; and, being no changeling, he never removed, but was true to his friends, and they to him, to the last hour of his life.

So much for his person and education. As for his parts, none had them more lively than he. Wit and repartee, in an affected rusticity, were natural to him. He was ever ready, and never at a loss; and none came so near as he to be a match for serjeant *Mainard*. His great dexterity was in the art of special pleading, and he would lay snares that often caught his superiors who were not aware of his traps. And he was so fond of success for his clients that, rather than fail, he would set the court hard with a trick; for which he met sometimes with a reprimand, which he would wittily ward off, so that no one was much offended with him. But *Hales* could not bear his irregularity of life; and for that, and suspicion of his tricks, used to bear hard upon him in the court. But no ill usage from the bench was too hard for his hold of business, being such as scarce any could do but himself. With all this, he had a goodness of nature and disposition in so great a degree, that he may be deservedly styled a philanthrope. He was a very *Silenus* to the boys; as, in this place, I may term the students of the law, to make them merry whenever they had a mind to it. He had nothing of rigid or austere in him. If any near him, at the bar, grumbled at his stench, he ever converted the complaint into content and laughing with the abundance of his wit. As to his ordinary dealing, he was as honest as the driven snow was white; and why not, having no regard for money, or desire to be rich? And, for good nature and condescension there was not his fellow. I have seen him for hours and half hours together, before the court sat, stand at the bar, with an audience of students over against him, putting of cases, and debating so as suited their capacities, and encouraged their industry. And so in the temple, he

seldom moved without a parcel of youths hanging about him, and he merry and jesting with them.

It will be readily conceived that this man was never cut out to be a presbyter, or any thing that is severe and crabbed. In no time did he lean to faction, but did his business without offence to any. He put off officious talkers about government or politics with jests, and so made his wit a catholicon, or shield, to cover all his weak places and infirmities. When the court fell into a *steddy* course of using the law against all kinds of offenders, this man was taken into the king's business, and had the part of drawing, and perusal of almost all indictments and informations that were then to be prosecuted, with the pleadings thereon, if any were special; and he had the settling of the large pleadings in the *Quo Warranto* against *London*. His lordship had no sort of conversation with him but in the way of business, and at the bar; but once, after he was in the king's business, he dined with his lordship, and no more. And there he shewed another qualification he had acquired, and that was to play jigs upon a harpsichord, having taught himself with an old virginal of his landlady's, but in such a manner, not for defect, but figure, as to see him were a jest. The king observing him to be of a free disposition, loyal, friendly, and without greediness or guile, thought of him to be the chief justice of the king's bench at that nice time, and the ministry could not but approve of it. So great a weight was then at stake, as could not be trusted to men of doubtful principles, or such as any thing might tempt to desert them. While he sat in the court of king's bench, he gave the rule to the general satisfaction of the lawyers. But his course of life was so different from what it had been, his business incessant, and, withal so crabbed, and his diet and exercise changed, that the constitution of his body, or head rather, could not sustain it, and he fell into an apoplexy and palsy, which numbed his parts, and he never recovered the strength of them. He outlived the judgment in the *Quo Warranto*, but was not present otherwise than by sending his opinion, by one of the judges, to be for the king, who, at the pronouncing of the judgment, declared it to the court accordingly, which is frequently done in like cases.

SIR LEOLINE JENKINS,

[From the Life of Lord Keeper Guilford.]

SIR *Leoline Jenkins* was the most faithful drudge of a secretary (u) that ever the court had. He was a civil lawyer, bred and practised; and, from the top of that profession, was taken into the court. For he was dean of the arches, judge of the admiralty for divers years, and withal (as the way of that faculty is) practised as advocate in all courts where he was not judge. He was also his majesty's advocate-general. This good man was ambassador, and went through the treaty of *Nimeguen*, and, coming home, was made secretary. His learning and dexterity in business was great; but his fidelity surmounted all; for which reason he was maligned by the fanatics in the highest degree, even to persecute his name and fortunes after he was dead. His lordship contracted an intimacy with this gentleman which I might call friendship, but the character is too general; and their union was purely respecting the king's affairs, in which they laboured with an exemplary accord.

The loss of secretary *Jenkins* was a great mortification to his lordship. I have often heard him say, upon that occasion, that he was absolutely alone in the court; and that no one person was left in it with whom he could safely confer in the affairs of the public. While the secretary stood, and the lord *Halifax* and the lord *Hyde*, who had spirits, and were hearty, they often met at the secretary's in evenings, to consider of such dependences as were to come before the king the next day. The benefit of which was very considerable to the king's affairs, as well as to themselves; for so the matters were better understood than if no previous deliberation had been taken; and they were not unprepared to speak to them in terms

proper for his majesty to entertain without mistakes, or clashing one with another, as happens sometimes about mere words, when the thing is agreed. But, after this change, they all began to look gravely upon one another, and to talk only of indifferent things. This secretary was not turned out, but quitted for consideration. He was a person that, together with incomparable veracity, fidelity, industry and courage, had some personal failings; for being used to forms, he was a little pedantic, and of a tender visage; for being inclined to laugh immoderately at a jest, especially if it were smutty, the king found him out, and failed not, after the tendency of his own fancy, to ply his secretary with conceits of that complexion; and so had the diversion of laughing at the impotence of the other's gravity. It is not amiss to subjoin here a historiette to shew the value of this minister. In the *Westminster* parliament, the house of commons was very averse to the court, and, from a party very prevalent there, the loyalists fell under great discouragements. Amongst the rest this good secretary was found fault with for something relevant he had uttered on the court side. Divers members, from the humility of his manner in speaking, supposed him to be a mild yielding man, and, to expose him, consulted about censuring his words, and ordering him to the bar, and to ask pardon upon his knees. And if this experiment had been pushed, and he had squeaked, as they call it, that is, recanted, and whined for an excuse, then he had been lost in every respect; for a sneaking man is despised and rejected on all sides. But for fear this, in the execution, might have an unlucky return upon them, they resolved first to sound him; for a secretary of state is no slight person to send to the tower, as must have been done of course, if he had stood firm. Thereupon, some half-faced friends told him he would be accused, and must kneel. He answered them in his formal way, *that he was a poor creature, not worth the resentment of the house: he should be always submissive to such great men as they were, in every thing that concerned himself. But as he had the honour to be his majesty's secretary of state, the case was not his, but his master's, and by the grace of the living God, he would kneel to, and ask pardon of,*

no mortal upon earth, but the king he served, and to him only would he give an account of any thing done with intent to serve him. This shewed that the business was like to be too hot for that time, and the design of it like to fail, and so it was let drop. But the secretary was met with at *Oxford*, when he was ordered to carry up the impeachment against *Fitzharris*; and, after all his huffing and striving, he found it best to do it. But, to return, it was notorious that, after this secretary retired, the king's affairs went backwards; wheels within wheels took place; the ministers turned formalisers, and the court mysterious. And no wonder, when the two then secretaries, professed gamesters and court artists, supplied the more retired cabals, and, being habituated in artifice, esteemed the honest plain dealers, under whose ministry the king's affairs were so well recovered, to be no better than beasts of burthen.

SIDNEY GODOLPHIN.

[From the Life of the Lord Keeper Guilford.]

MR. *Godolphin* was a courtier at large, bred a page of honour; he had, by his study and diligence, mastered not only all the classical learning, but all the arts and entertainments of the court; and, being naturally dark and reserved, he became an adept in court politics. But his talent of unravelling intricate matters, and exposing them to an easier view, was incomparable. He was an expert gamester, and capable of all business in which a courtier might be employed. All which, joined with a felicity of wit, and the communicative part of business, made him be always accounted, as he really was, a rising man at court.



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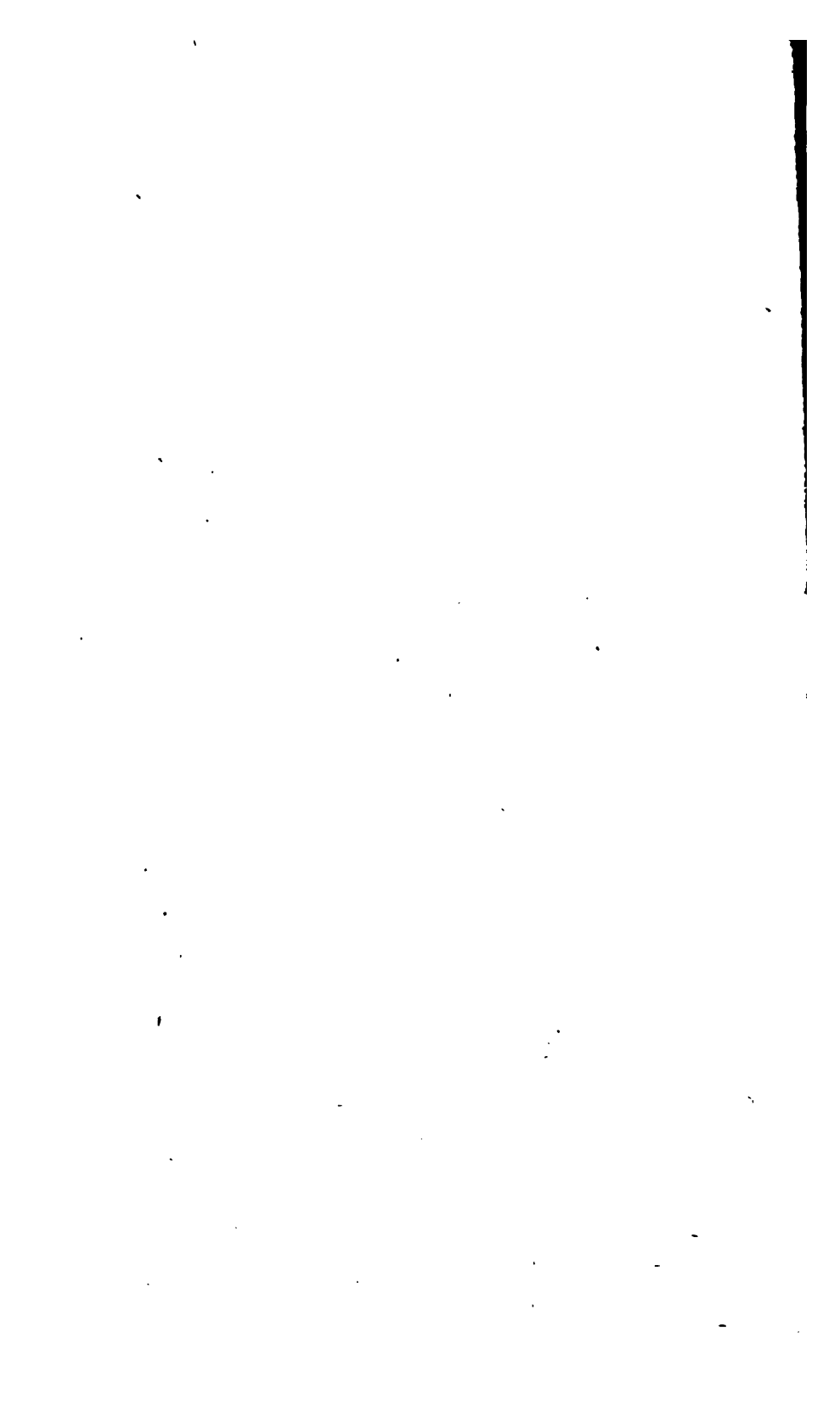
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TREATISE
ON
THE LAW OF WAR.



A
TREATISE
ON
THE LAW OF WAR.

Translated from the original Latin of
CORNELIUS VAN BYNKERSHOEK.

BEING
THE FIRST BOOK
OF HIS
QUÆSTIONES JURIS PUBLICI.

WITH NOTES,
BY PETER STEPHEN DU PONCEAU,
Counselor at Law in the Supreme Court of the United States
of America.

— Ne fortior omnia possit.—Ov: n.

PHILADELPHIA:

Published by Farrand & Nicholas; also, by Farrand, Mallory & Co., Boston;
P. H. Nicklin & Co., Baltimore; D. Farrand & Green, Albany;
Lyman, Mallory & Co., Portland; and Swift &
Chipman, Middlebury, (Vt.)

Fry and Kammerer, Printers.

1810.

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PREFACE.

THE following translation was made several years ago for my own private use, and without any intention of ever publishing it. But Mr. *Hall*, the editor of the *American Law Journal*, having expressed a wish to insert it in that valuable periodical work, I freely consented to it, having no other idea at the time but that it should appear there as an anonymous performance. The manuscript was accordingly handed over to the printers of the *Journal*, and the first ten chapters were printed off, without undergoing any other corrections but such as occurred in revising the proof sheets, to which I subjoined a few short notes as I went along.

But while I was engaged in that occupation, I felt my ancient attachment to a favourite author revive; the subject grew upon me; I gave an attentive revisal to the remainder of the manuscript, and added to it a more copious body of notes; and I now, with diffidence, venture to present the result of my labours in my name to my brethren of the American bar. It is, according to its first destination, published in and for the *American Law Journal*, and will be delivered to its subscribers as the third number of the third volume of that publication; but a sufficient number of copies will also be struck

off for such as may wish to possess it as a separate work.

I need not explain to those who are conversant with the works of my author, that his *Questiones Juris Publici* are divided into two parts, entirely distinct from and unconnected with each other, otherwise than by being published together under one title, and by their general relation to subjects of public law. The first part, *De Rebus Bellicis*, treats exclusively of the law of war, and forms of itself a complete treatise on that particular subject. I have thought it best, therefore, to translate and publish it separately, under its appropriate title, *A Treatise on the Law of War*.

To expatiate on the merits of this excellent work would be useless. It is known and admired wherever the law of nations is acknowledged to have a binding force. Its authority is confessed in the cabinets of princes, as well as in the halls of courts of justice: to be unacquainted with it, is a disgrace to the lawyer and to the statesman. It ranks its author among the great masters of the law of nature and nations, with *Grotius*, *Puffendorff*, *Wolffius*, and *Vattel*. His range is not indeed so extensive as that of his illustrious colleagues; but he has more profoundly investigated and more copiously discussed than any of them the particular branch which he assigned to himself.

It is extraordinary that a treatise, the merit of which is so generally acknowledged, has not as yet been translated into any of the modern languages (the *Low Dutch* excepted), and that the *English*, particularly, who profess to admire it so much, have not favoured the world with a good translation of it into our common idiom. For we cannot consider as such the incorrect and incomplete version which in the year 1759 was, by the help

of some interpolations, published by Mr. *Richard Lee*, as an original work, under the title of *A Treatise of Captures in War*, a second edition whereof appeared at London in 1803, in the preface to which the book is for the first time acknowledged to be an *enlarged translation* of the present work. The insufficiency of that performance to supply the place of our author's text is every where admitted; and the friends of science in this country have long expected that some of the learned civilians of Great Britain, a *Robinson*, a *Ward*, or a *Brown*, would present the world with an English translation of the treatise *De Rebus Bellicis*, executed in a manner worthy of its author. But this fond hope has unfortunately been disappointed.

No person has wished more anxiously than myself to see this translation performed by some one of the able professors whom I have just named, and who are so capable of doing it complete justice. Then my favourite author would have appeared in an *English* dress, with all the advantages which brilliant talents, combined with a profound knowledge of the science of which he treats, could have given him. The translation which I offer to the public cannot boast such high advantages; it claims no other merit but that of correctness, the only one which a translator cannot dispense with. To deserve this humble praise has been the object of my constant efforts. I have endeavoured to discover the precise English expressions which my author would have used, if he had written in our language. If sometimes I have shortened his long *Ciceronian* periods, and divided them into more convenient paragraphs; if sometimes, also, I have connected his phrases in a manner more suited, as I thought, to the idiom in which I wrote, I believe that I have done it without injury to the

sense. Where my author narrates, I have endeavoured to state with fidelity the facts and events that he relates; where he argues, to convey the full force of his able and luminous reasoning, and I was sensible that it could not be done better, than by keeping as close to the text as possible. I have but in few instances wandered from this strict plan, and only where our author treats of local subjects, of little or no interest to the *American* reader. Of the few other liberties, which I have thought necessary to take in the course of this work, it is proper that I should give an account in this place.

I have shortened the titles of the several chapters, which in the original are presented in the shape of queries, to suit the modest title of *Questions*, which is prefixed to the whole work. Considering this first part, as justly entitled to be considered a complete and regular *treatise* on the law of war, I have thought it my duty to present it as such to my readers, and to head its several divisions accordingly.

For the same reason, I have entitled the twenty fifth chapter, which in the original bears the title of "Various Small Questions," (*Varie Quæstiuncula*); MISCELLANEOUS MAXIMS AND OBSERVATIONS, for such they will appear to be; and I have headed each of the sections into which that chapter is divided, with the result of the observations that it contains, in the form of an *axiom* or *aphorism*, so that the reader may see at once the proposition which the author means to maintain or to illustrate in each of those subdivisions.

I have omitted the whole of the twenty third chapter and some parts of a few others, which are pointed out in notes in their several places, as treating of subjects which are local in their nature and application, and consequently, are neither useful nor interesting to us. I have, for the

same reason, left out a great number of the references, which our author frequently makes to the *Dutch* statute books, and to some other national works, little or not at all known in this country. I have, however, preserved a few to some of the most noted among them, and particularly to *Aitzema*, whose *Chronicle* I consider as an excellent compilation of historical facts and documents, of which I have endeavoured to give a character in a note to page 15.

I have thrown into notes, in the fifteen last chapters, the numerous references which abound in the body of the original work. The first ten chapters being in the press, as I have already mentioned, when I began to revise this translation, I was prevented from doing the same with respect to them by the fear of giving to the printers too much additional trouble.

With regard to the notes which I have subjoined to the body of the work, and which, to distinguish them from those of the author, are marked *T.*, they are principally intended to elucidate and explain the text. Our author often slightly refers to facts which were well known, and some of them even remembered in his day; frequently, also, he alludes to particular texts of the civil law, and to the opinions of writers whose works were familiar to the civilians of *Europe* and of his country, but are little read among us. In every such instance, whenever it has been in my power, I have presented the reader, in a note, with the text or passage referred to; and where that could not conveniently be done, I have given such explanations as I thought would best enable him clearly to understand the scope and meaning of the observations or arguments of our author.

As I progressed in the work, I have added some other notes, which exhibit a comparative view of the

principles and practice of the different states of *America* and *Europe* on various interesting points. In a few instances I have presumed to advance my own opinions, and even in some of them to differ from my author himself; but I have done it, I am sure, in the spirit, and, I hope, in the manner pointed out by the great orator, *quærens omnia, dubitans plerumque, et mihi diffidens.**

I have thought that an account of the life and writings of *Bynkershoek* would not be unacceptable to the reader, and therefore it will be found immediately after this preface. I have added to it a brief alphabetical notice of those writers on the civil law or the law of nations, whose works are not generally known, and are quoted or referred to in this book. A list of the American and English cases cited in the notes, and a table of reference to the books and titles of the quotations from the text of the civil law, which occur in the course of the original work, are also subjoined. I regret that some errors of inadvertence have escaped my attention, particularly in the notes, which I acknowledge, were written with some degree of haste, though they are the result of much previous study and reflection. Such of those errors as I have discovered are noticed in an *errata*, at the end of the book.†

Being about to commit this work to the candour and indulgence of the public, I have thought it necessary to premise these few observations. It has long been, as I have already observed, an anxious wish of the *American* jurists to see this celebrated treatise correctly translated into our language, and published in a portable form. It is very difficult to procure in this country a copy of the

* Cic. acad. quæst. 1.

† To which add the following, which was not noticed at the time: page 155, line 1, of the text, *dele* "whether."

original, which is only to be found in a few of our libraries. Nor can it be obtained from Europe, without purchasing at the same time two folio volumes, which contain a great deal of matter of little interest to those who do not make the civil law the object of their particular study. With the greatest diffidence, therefore, I submit this feeble attempt to the candid and enlightened judgment of my professional brethren; if it shall be thought deserving of their approbation, I shall consider it as an ample and honourable reward of my labours, otherwise I shall endeavour to profit by their censure.

At the present moment, when the fate of *Holland* creates a lively interest in every feeling mind, the public will be disposed to receive with peculiar indulgence, a work which recalls to our memory the brilliant epochs of that celebrated republic, once so famed in arts as well as in arms. She has proved to the world, that the republican spirit of commerce, and the honourable pursuits of industrious enterprise are not incompatible with any of those more brilliant attainments by which nations as well as individuals are raised to celebrity. Since her separation from the *Spanish* empire she has produced more great men, and achieved more great deeds, than all the remainder of that once immense and powerful monarchy.

Holland is no more, but the remembrance of her past glory can never die. The admirers of military exploits will with pleasure and pride dwell on the achievements of her *Maurice*, her *De Ruyters*, and her *Van Tromps*. The statesman will still guide his political bark by the lights which her *De Witts*, her *Van Beuningens*, and her *Fagels* have supplied. The astronomer, the philosopher, will explore the secrets of nature and the heavens, with her *'sGravesandes* and her *Huygens*. The physician will improve his theory and his practice by the discoveries

of her *Boerhaaves* and her *Van Swietens*. And the student, who delights in investigating the principles of that law of nations, so much talked of and so little practised, will ever revere the hallowed soil which gave birth to such illustrious men as *Grotius* and our **BYNKERSHOEK**.

His saltem accumulem donis & fungar inani
Munere.

Philadelphia, October, 1810.

AN ACCOUNT
OF THE
LIFE AND WRITINGS
OF
THE AUTHOR.

CORNELIUS VAN BYNKERSHOEK was born the 29th of May 1673, at *Middleburgh*, the capital of the province of *Zealand*, where his father was a respectable merchant. He received his education at the university of *Franeker* in *Friesland*, and his juvenile exercises while there, drew upon him the attention of the celebrated professor *Huberus*,* who in one of his elaborate dissertations, calls him *eruditissimus juvenis CORNELIUS BYNKERSHOEK*.† On leaving the university, he settled at the Hague, where he exercised with great applause the profession of an advocate, and published from time to time ingenious and learned dissertations on various subjects of the civil, and of his own municipal law. In the year 1702, he published his excellent dissertation *De Dominio Maris*, and the next year was appointed a judge of the Supreme Court of *Holland, Zealand, and West Friesland*, which sat at the *Hague*. In the year 1721, he published his learned treatise *De foro Legatorum*, and three years afterwards, on the 26th of May 1724, was appointed president of the respectable court, of which he already was a member. He was now fifty one years of age. His

* Well known in this country, by his dissertation *De Conflictu Legum*, part of which has been translated into *English*, and published by Mr. *Dallas*, in a note to the case of *Emory v. Greenough*, in the third volume of his *Reports*, page 370.

† *Huber. Ennomia Romana*, ad l. Lecta, D. de reb. cred.

celebrated *Quæstiones juris publici*, are among the last works that he produced, as they did not appear until the year 1737, when he was sixty four years old. He died of a dropsy in the chest, on the 16th of April 1743, in the seventieth year of his age. He was twice married. By his second wife he had no children, but left six daughters by his first wife.

His works consist chiefly of dissertations and treatises (which he modestly calls *quæstiones*) on various subjects of the law of nations, and of the civil law, combined in some instances with the municipal regulations of his own country. They were published separately, in his lifetime, except the *Quæstiones juris privati*, which appeared only after his death. These are only a part of a larger work, which he did not live to finish. He had however prepared the four first books for the press, when death put a period to his labours. He had not even time to write more than the first paragraph of a preface, with which he intended to usher that work into the world, and in which he appears fully sensible of his approaching end.

Eighteen years after his death, his scattered writings were collected together by the learned *Vicat*,* professor of jurisprudence in the college of *Lausanne* in *Switzerland*, and published in two folio volumes at *Geneva*, in the year 1761. This edition is the only one, that we know of, of all the works of our author, though we are informed that some of his treatises have gone through several editions in his own country. The *Baron Von Ompteda*† notices a second edition of the *Quæstiones juris publici*, *Leyden* 1752, 4to. But this, the best and most complete monument of his fame, was published in a foreign land.

This edition is remarkable for its beauty and correctness, and is adorned with an elegant preface by the learned editor, and an account of the author's life and writings, from which we have in part gathered the information which we now communicate to the *American* reader.

* *M. Vicat* is the author of an esteemed treatise on natural law, entitled: *Traité du Droit Naturel & de l'application de ses principes au Droit Civil & au Droit des Gens*. *Lausanne*, 1782, 4 vols. 8vo. *Baron Von Ompteda* calls it a very useful book. *Litter. des Vælkerr.* p. 389.

† *Litteratur des Vælkerrechts*, p. 420.

We shall here give a brief notice of the several works of our author, which are contained in the collection of professor *Vicat*, although but few of them can be of any practical use in this country, yet we believe that a general idea of the whole will not be thought altogether uninteresting.

I. The first volume contains :

1. *Observationes juris Romani*, in eight books, in which a variety of curious points, relating to the ancient *Roman* jurisprudence, are ably discussed, several of which are interesting in an historical point of view, as elucidating through the medium of their laws, the manners and customs of that once great people. Among those, we notice the first chapter of the first book, in which the terrible *partis secanto* of the law of the twelve tables is ingeniously and plausibly maintained to have meant no more than that the insolvent debtor should be sold in the public market as a slave, and the proceeds of the sale distributed among his creditors. The 14th chapter of the third book discusses the question, how far and in what cases the military force could among the Romans be called in to the aid of the judicial authority. In the 4th book, chap. 13, the author comments on the 19th law of the digest *De ritu nuptiarum*, by which a father was obliged to give his daughter in marriage with a competent portion, if a suitable match offered; and if he refused, might be compelled to it by the magistrate. Various other subjects of an equally interesting nature to the scientific lawyer, are examined and discussed in the course of that work; of which we think it sufficient to have instanced a few, to give an idea of the general scope and object of the whole.

2. *Opuscula varii argumenti*. This work like the former, consists of dissertations on various subjects of the Roman law. They are six in number, the most interesting of which are the first, on the second law of the digest *De origine juris*, the third on the right which fathers had among the ancient Romans, of killing, selling, or exposing their children, and the fourth on the Roman laws, respecting foreign modes of worship. This last is replete with curious information, particularly with regard to the law which prevailed on that important subject, in the first ages of christianity.

3. This volume concludes with an answer to his learned

cotemporary *Gerard Noodt*, who had controverted some of the opinions which he had delivered in his above mentioned dissertation, on the power which fathers had at Rome over their children.

II. The contents of the second volume are as follow:

1. *Opera Minora*, consisting of six dissertations on various subjects, none of which will be thought very interesting in this country, except the 5th, *De Dominio Maris*, and the 6th, *De foro legatorum*. These, indeed, had he never written any thing else, would have been sufficient to establish our author's reputation as a lawyer, and a publicist. Every one who has read and understood, and of course admired them, cannot help finding fault with the excessive modesty which induced him to publish them under the inappropriate title of *opera minora*. The learned world has long classed them among the best works that have ever appeared on those generally interesting subjects.

In the dissertation *De Dominio Maris*, our author considers the long agitated question of the *Dominion of the Sea*, in a liberal and impartial manner, unbiassed by prejudice, and unswayed by party spirit. He calmly and dispassionately considers in what cases the sea is capable of becoming the subject of sovereignty or exclusive jurisdiction, discusses with candor the various pretensions which different states have set up from time to time to the dominion of that element, or of considerable portions thereof; and upon the whole, his conclusions are such as reason avows, and moderate men will ever be disposed to adopt.

His dissertation, or rather treatise *De foro Legatorum* is in every body's hands, in the excellent translation which Mr. *Barbeyrac* made of it into the *French* language, with notes, in which he has displayed his usual judgment and learning. That translation has not only received the approbation, but the praise of our author himself, with whom Mr. *Barbeyrac* was intimate. We shall therefore dispense with giving a more particular account of a work which is so well and so generally known. To name it is sufficient praise.

2. *Questiones juris publici*. This work is divided into two parts; the first of which, entitled *De Rebus Bellicis* is now presented in an *English* translation to the *American* public, under

its appropriate title of "*A Treatise on the Law of War*;" and a more complete one never yet has been written on this interesting subject. The *second* part which is entitled *De rebus varii argumenti*, treats of various subjects, some of them belonging to the law of nations, and others to the constitution and laws of the *United Netherlands*. From the 3d to the 12th chapter inclusive, our author treats of the law of *ambassadors*, and those chapters might well be added to the treatise *De foro Legatorum*, with the subject of which they are more nearly connected than with any other. In the *seventh* chapter he examines the question, whether the acts of a minister are binding when *contrary to his secret instructions*. The 21st chapter treats of the salute to ships of war at sea, and seems to belong more properly to the dissertation *De Dominio Maris*, where the same subject is treated of. The remainder of the chapters, twenty-five in number, do not treat of any subject of general concern, and the whole of this second book is unconnected with the first, which is best exhibited as a separate and independent treatise on the *Law of War*.

The *Quæstiones juris publici* have been translated into the *Low Dutch* language by *Matthias Ruuscher*, in the year 1739. We do not know of any other translation of them into any language whatever, except that of the first book by Mr. *Lee* into *English*, of which we have made mention in the preface.

3. *Quæstiones juris privati*. This work, which was to have contained one hundred chapters, and contains only forty-eight, was left incomplete, as we have already mentioned, by the death of the learned author. It is divided into four books, chiefly on topics of the civil law and the municipal law of *Holland*. The fourth book alone, and the last chapter of the third, may be considered as interesting to the *American* jurist, as they treat of the subject of insurance, and of various points of the maritime and commercial law. This work closes the second and last volume.

Our author also wrote two other considerable works, the one entitled *Corpus juris Hollandiæ & Zelandiæ*, and the other *Observationes Tumultuariæ* or *hasty notes*, being memoranda which he took from day to day, of the decisions of the court in which he sat for the space of forty years. He gave directions

by his will, to his executors, that those works should not be published; and they strictly complied with his injunction. As the ancient laws of *Holland* have been subverted, and the *Napoleon code* introduced in their place, it is probable that those writings, if published, would not be found of any great use at the present time.

The character of our author's works has long been established among the learned of Europe. *Heineccius*, who, in the year 1723, published at *Leipsich*, an edition of the four first books of the *Observationes Juris Romani*, calls him in his preface to that work, "a man of consummate learning and ability, possessing a sound discriminating mind, and an extraordinary and incredible fund of legal knowledge."* *Barbeyrac*, in the preface to his translation of the treatise *De foro Legatorum*, describes him as one of that superior class of writers, whose works are only intended for men of learning, and who, disdaining to retail the opinions of others, are unwilling to say any thing which has been observed before, and endeavour, as much as they can, to exhibit their subject in some new point of view. "And he is right," continues he, "to have taken that ground. One who possesses, within himself, such a rich fund of knowledge, may well leave it to others to borrow and repeat what has already been said."†

In *England*, the great Lord *Mansfield* thought him worthy of his high commendation from the bench, and recommended the work which we have translated, to the attention of the members of the *English bar*.* Since that time, our author's works on the law of nations, (but particularly that which is now before us) have been considered as standard authorities, in *Great Britain* as well as in the *United States*, and are daily quoted

* *Admiratus præcipuè viri eruditissimi judicium acre, ingenium solers, juris scientiam inusitatam ac denique incredibilem.*

† *Notre auteur est un de ces écrivains du plus haut vol, qui n'écrivent que pour les savants, et qui ne veulent dire, autant qu'il se peut, rien que du nouveau. Et il a raison de se mettre sur ce pied là. Quand on est si riche de son propre fonds, on fait très bien de laisser à d'autres le soin d'emprunter ce qui a été déjà dit.*

* Lord *Mansfield* spoke extremely well of *Bynkershoek*, and recommended especially, as well worth reading, his book of prizes, *Questiones juris publici*. 2 Bur. 690, in margin.

with respect by the bar, and relied on by the bench as the ground of their decisions.

Nor have our American statesmen been behindhand in commending the merit and talents of this eminent writer. Among them none has bestowed upon him more correct and judicious praise, than the great character, who is generally understood to be the author of the excellent *Examination of the British doctrine, which subjects to capture a neutral trade, not open in time of peace*. “*Bynkershoek*,” says he, “treats the subject of belligerent and neutral relations with more attention, and *explains his ideas with more precision* than any of his predecessors.”† How honourable to our author is this testimony, when we consider, on the one hand, by whom it is given; and reflect on the other, that in the list of those predecessors whom Mr. *Madison* speaks of, are found the celebrated names of *Puffendorff* and of *Grotius*!

It ought to be a great inducement to the study of the law of nations, that the fame of those who devote themselves to that important branch of science, extends throughout the civilized world; while the most excellent works on mere municipal jurisprudence, are hardly known or spoken of out of the country which gave them birth. Thus the writings of *Gratius*, *Bynkershoek*, and *Vattel*, are read and admired in all *America* and *Europe*, while the very names of *Coke* and *Dumoulin*‡ are unknown out of the countries where the particular systems of law are in force, which they took so much pains to methodize and elucidate. Of the truth of this observation, a striking instance is to be found in the works of our author, who from an opinion of lord *Coke*, which he had found quoted and misrepresented in Dr. *Zouch*’s treatise *De jure inter gentes*, conceiving him to be a writer entirely ignorant of the law of nations, treated him and his opinion with the most marked contempt, calling him a certain *Coke*, (*Cocus quidam*); and punning upon his name, declared that he could not concoct his opinions,

† *Examination*, &c. p. 22.

‡ Styled the prince of the French Law—*le Prince du Droit François*. *Vie de Dumoulin*, par *Blondeau*.

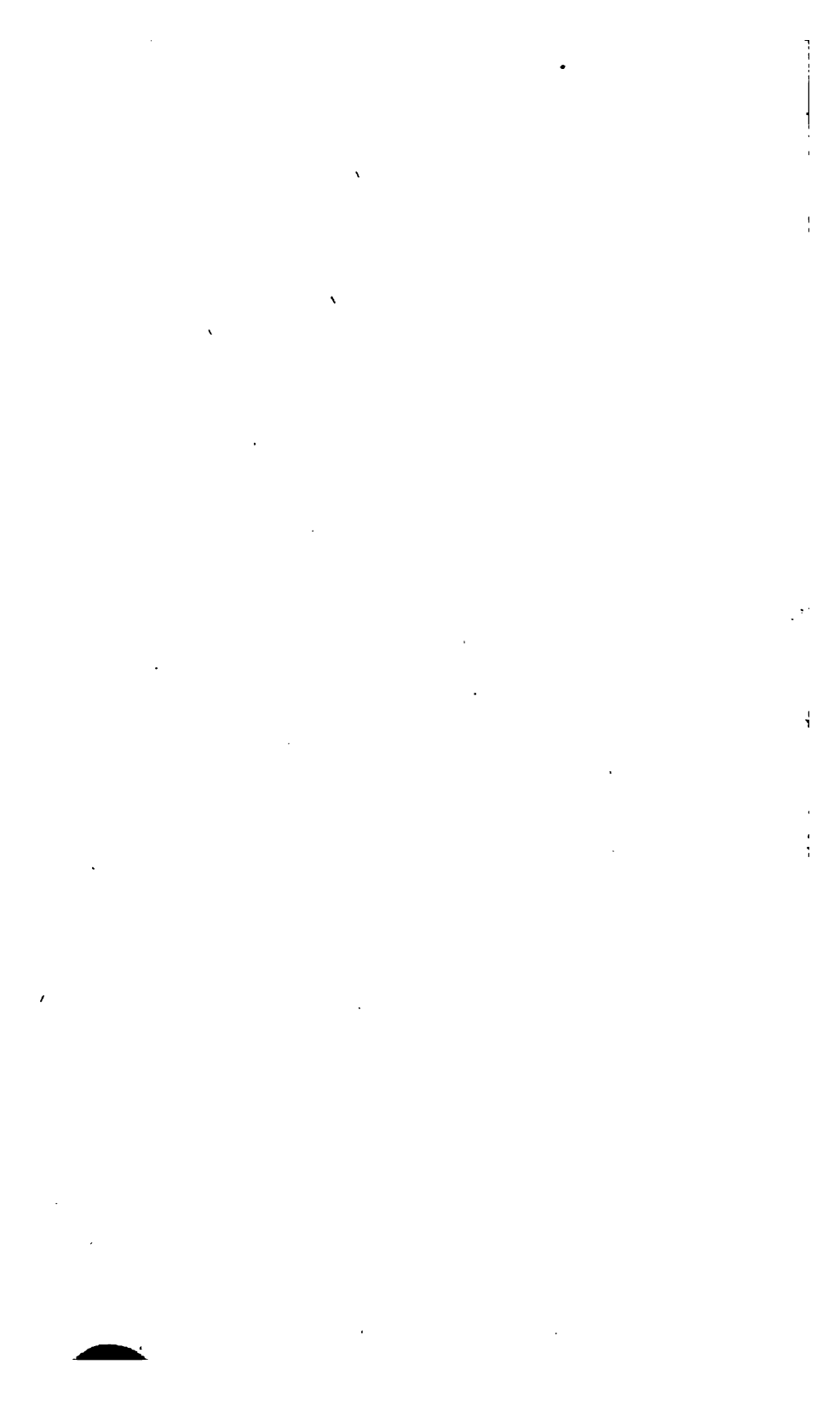
nor could they be concocted by the other writers on the law of nations.*

It is to be wished that this passage were expunged from our author's writings, particularly as it is, perhaps, the only time that he has indulged in such undignified language; and unfortunately he has applied it to a man whom of all others he would have admired, had his studies but led him to a perusal of his writings. Little did he know that that *Cocus quidam*, whom he so unjustly despised, was one whose powerful mind was in every respect congenial to his own; and yet he thought him unworthy of his serious notice, while he paid an unmerited attention to the works and opinions of such an inferior writer as Dr. Zouch. But Zouch had written on the law of nations, which is studied every where, and the great Coke had only elucidated the municipal law of England, which is not any where an object of attention, except in those countries where it is the established system of jurisprudence.

Unfortunately many of the works that have appeared on various subjects of the law of nations, are some of them polemical writings, written in the heat of a particular controversy, and on the spur of the occasion; and others, though professing to be on a more liberal scale, do nevertheless betray the partiality of their authors to the system adopted by the country in which they lived, or the governments under whose patronage they wrote: it is not so with the work which we now present to

* — *eamque sententiam tuctur COCUS QUIDAM apud Zoucheum, De jur. fec. p. 2. § 4. Q. 19. Sed ego tam difficilis stomachi sum, ut eam sententiam concoquere non possim, neque etiam concuxit Albericus Gentilis neque Zoucheus. Quæst. jur. pub. l. 2. c. 5.* The opinion that our author could not assent to is that which is expressed by Lord Coke in 4th Inst. 153. "If a banished man "be sent as ambassador to the place from whence he is banished, he may not be "detained or offended there; and this also agreeth with the civil law." But he had not well considered that opinion, which appears a very sound one, and perfectly agrees with his own, which is, that such a minister indeed, may be sent out of the country; but that it would be a violation of good faith, to detain and punish him for having returned, notwithstanding his sentence of banishment. But *Synkershoed* viewed Lord Coke in the light in which he was exhibited to him by Zouch, who represented that great man as learned, indeed, in the municipal law of England, but ignorant of the law of nations. *Juris patrii consultissimus noster Edoardus Coke: quia quod cum exteris obtinet NON AD EÙ PERITIS.* Zouch, ubi supra

the public; it was written at a time when *Europe* was in a state of profound peace, when there was no particular point warmly controverted between the *European* governments, and although the author was a Dutchman, and wrote in the bosom of his native country, yet we see that he did not even adopt the favorite doctrine, for which his government had been struggling during the space of near a century, that *free ships make free goods*; so that although many among us may not agree with him on this particular point, still we cannot withhold from him the praise of a strict and honest impartiality; and upon the whole, very few propositions will be found in the present treatise, to which all moderate and impartial men will not give their cordial and unfeigned assent.



A BRIEF
ALPHABETICAL NOTICE
OF
SEVERAL WRITERS AND WORKS
ON THE

CIVIL LAW AND THE LAW OF NATIONS:
Not generally known, and which are quoted or referred to in this book.

ABREU (*the chevalier de*). See note, p. 130.

AITZEMA (*Leo or Leeuwe*). See note, p. 15.

BELLUS (*Petrinus*), a *Venetian* writer, author of a dissertation *De re militari*, printed at *Venice* in 1563, 4to. It is to be found also in the 16th vol. of *Tractatus Tractatum, seu Oceanus Juris*; an enormous work, being a collection of legal tracts, in 18 folio volumes, published at *Venice* in 1584, under the auspices of pope *Gregory* the 13th. It contains a multitude of writings on the civil and canon law, by jurists of the middle ages; some of them of so early a period as the sixth century. In this curious collection, there are several tracts which relate to subjects of the law of nations.

BOLAÑOS (*Juan de Hevia*), a *Spanish* writer, a native of *Oviedo*, in the province of *Asturias*; author of an excellent institute of the law of *Spain*, entitled *Curia Philippica*; the last part of which treats of commercial and maritime law, and has been the foundation of many subsequent works upon that subject. *Roccus* has borrowed liberally from it. This work is remarkable for its clearness, brevity and precision, and lays down very sound and correct principles on the subject of maritime and commercial jurisprudence. The author informs us, that it was finished at the city of *Los Reyes*, in the kingdom of *Peru*, on Christmas eve, in the year 1615. It may therefore be considered as an *American* production. The edition before us, was printed at *Madrid*, 1783, in folio. It is a book of very great authority throughout the *Spanish* dominions, and in our territories of *Orleans*.

and *Louisiana*, and is often quoted by foreign writers, on subjects relating to maritime law.

BUDDEUS (*John Francis*), a German professor at *Halle*, and afterwards at *Jena*, where he died in 1705. He was the author of several works, and among others, of a book entitled *Elementa Philosophiæ practicæ, instrumentalis & theoreticæ*, 3 vols. 8vo. the same which is so contemptuously referred to by our author, and was nevertheless formerly so celebrated, that the professors of the protestant universities of Germany, took it for the text of their lectures. He also wrote the great German historical dictionary, printed several times at *Basil* and *Leipsig*, in 2 vols. fol.

CLEIRAC, a Frenchman, author of a valuable work on maritime law, entitled *Les Us & Coutumes de la Mer*. It contains, 1. The text of the laws of *Oleron*, *Wisbuy*, and the *Hanse Towns*, with learned notes. 2. *Le Guidon de la Mer*, an ancient French treatise on maritime contracts, and principally on *Insurance*, divided into sections, in the form of an institute, and enriched with notes fraught with much curious learning. 3. The laws or ordinances of *Antwerp* and *Amsterdam*, concerning insurance. 4. A treatise on the French admiralty jurisdiction, and a copious index to the whole work. There have been several editions of this book; the first that we find any mention of, was printed in 1647; and the last at *Amsterdam*, in 1788.

CODE DES PRISES. This French work is well known in this country, but it is not generally understood that there are four editions of it, or rather four different works, all nearly on the same plan, but published at different periods; and containing more or less information on the important subject of *maritime captures*.

The first is the *Old Code des Prises*, by M. Chardon, who was secretary, under the monarchy, to the council of prizes at *Paris*. It is entitled *Code des Prises; ou recueil des Edits, Declarations, &c. depuis 1400, jusqu' à présent; Imprimé par ordre du Roi; 2 vols. 4to. Paris, imprimerie royale, 1784.*

The second is entitled *Code des Prises maritimes & armements en course, par le Citoyen G., homme de loi; 2 vols. 12mo. Paris, Garnery, an 7.*

The title of the third is *Nouveau Code des Prises, par le Cit. Le Beau, 4 vols. 8vo. Paris, Imprimerie de la République, ans 7, 8 & 9.* It is brought down to the 3d Prairial, 8th year, (23d of May, 1800.)

The fourth is entitled *Code des Prises & du Commerce de terre & de mer, par F. N. Dufriche Foulaines, jurisconsulte; 2 vols. 4to.*

small close print. *Paris, Duprat du Verger, 1804.* It is more copious and complete, and is brought down to a later period, than any of the others.

CONSILIA BELGICA is a collection of official opinions given to the states general of the *United Netherlands*, by the law officers of that government.

CONSILIA HOLLANDICA, are the opinions of the law officers of the provincial states of *Holland* and *West Friesland*, collected in like manner.

CONSOLATO DEL MARE. This celebrated work is but little known in this country, owing to the difficulty of procuring it from abroad, and to its being written in languages not generally understood. The forty three first chapters have been translated from the *Amsterdam* edition, by *Westerveen*, and published in the *American Law Journal*, (vol. ii. p. 385, and vol. iii. p. 1.) but they relate only to the form of judicial proceedings in the maritime courts of the kingdom of *Majorca*, and are thought by many not to belong to the ancient *Consolato*.

The oldest edition of this work has lately been discovered by Mr. *Boucher*, in the Imperial library at *Paris*. It is embodied with the marine ordinance of *Barcelona*, of which it constitutes the principal part, and was printed in that city, in the *Catalonian* language, in the year 1494, thirty-seven years only after the discovery of the art of printing. Mr. *Boucher* has favoured the public with a translation of it into the *French* language, printed at *Paris* in 1808, several copies of which have already made their way into this country. Mr. *Hall*, of *Baltimore*, (to whom the profession is already indebted for a very good translation of the *Praxis Curie Admiraltatis*, enriched with learned and useful notes,) is, we understand, at present employed in translating it into the *English* language, which will entitle him to the thanks, not only of the scientific, but also of the *practical* lawyer. That excellent book has been styled, with great propriety, the *Pandects of maritime law*.

A copy of the beautiful edition of the *Consolato*, published at *Madrid*, in 1791, in the *Catalonian* language, with a *Spanish* translation, by *Don Antonio de Capmany y de Monpalau*, is in the library of the *American Philosophical Society*, to whom it was presented by his excellency, the marquis de *Casa Yrujo*.

CUNÆUS or à Cunæo (*Gulielmus*) author of a small treatise on *Suretiship* (*De materia securitatis*). See MERCATURA (*De*).

CURIA PHILIPICA, See BOLAÑOS.

CYNUS or CINO, was a learned *Italian* lawyer, who flourished in the beginning of the 14th century. He died at *Bologna*, in 1336. He wrote a commentary on the *Code*, and some parts of the *Digests*.

GALIANI (the abbé *Ferdinando*), is a celebrated *Neapolitan* writer. He was secretary to the *Neapolitan* legation at *Paris*, and afterwards a member of the Royal Council of Commerce in his own country. In the year 1782, he published at *Naples*, his treatise *De' doveri de' Principi neutrali verso i Principi guerreggianti, e di questi verso i neutrali*; (*Of the duties of neutral and belligerent princes towards each other.*) It was translated into *German* by professor *König*, and published at *Leipsick*, in two octavo volumes, in 1790, under the title of *Recht der Neutralität (the law of Neutrality)*. The life of *Galiani* has been written and published at *Naples*, by *Diodati*, in 1788. See *LAMPREDI*.

GAMA (*Antonio de*), born at *Lisbon* in 1520; was counsellor of state, and high chancellor to the king of *Portugal*. He wrote, among other things, a book of reports of *Portuguese* decisions, entitled, *Decisiones Supremi Lusitaniae Senatus*, in folio. He died in 1593, at the age of 75 years, greatly respected for his immense erudition.

GENTILIS (*Albericus*;) born in the marquisate of *Ancona*, in the *Roman* state, about the year 1550; was professor of the civil law at *Oxford*, and died at *London* in 1608. He published a treatise, *De jure belli*, in three books, which has not been useless to *Grotius*, and in which, at that early day, he supported the belligerent claims of *Great Britain*, against the pretensions of neutrals. *Lampredi*, in his preface, says, that he was the first who endeavoured to introduce a system of jurisprudence amidst the din of arms. Although he may be properly considered as an *English* writer, it is remarkable that his name does not appear in the *Bibliotheca Legum Angliae*.

GRONOVIVS (*John Frederick*), was born at *Hamburgh*, in 1611, and was professor of literature at *Drunter*, and afterwards at *Leyden*, where he died in 1672. He published many valuable editions of Latin authors, and among others of *Grotius*, *De jure belli ac pacis*, with learned annotations. His son, *James Gronovius*, distinguished himself likewise, by several works of learning and erudition.

GUIDON DE LA MER (*Le*). See *CLEIRAC*.

HORNE (*Thomas Hartwell*), an *Englishman*; is the author of an useful work, entitled: *A compendium of the statute laws and regulations of the court of admiralty, relative to ships of war, privateers, prizes, recaptures and prize money; with an appendix of notes, pre-*

cedents, &c. 168 pages, duodecimo; London, Clarke, 1803. This book is scarce in America.

IMOLA (*Joannes de*), was professor of the civil law, at *Bologna*, in the *Papal* states, and a disciple of the elder *Baldus*. He composed a great number of professional works, which were much admired in his day, but are at present no longer read. He died in 1436.

KOCH, a *Frenchman*, professor of law at the university of *Strasbourg*, and member of the national institute, is the author of an excellent work in the *French* language, entitled, *Abregé de l'Histoire des Traité de paix entre les puissances de l'Europe, depuis la paix de Westphalie*, Basil 1796. 4 vols. 8vo.

LAMPREDI, was a professor of the law of nations, at the university of *Pisa* in *Tuscany*. He published at *Florence*, in the year 1788, his *Trattato del commercio de' popoli neutrali in tempo di guerra*, (a treatise on the commerce of neutral nations in time of war.) It has been translated into *German*, by professor *König*, *Leipsig*, 1790; and into *French*, by *M. Peuchet*, *Paris*, 1802, one vol. octavo. *M. Peuchet* tells us, that the ministry of *Louis XVI.* had ordered a translation of this work to be made, but it was not executed during his reign.

Lampredi combats on many points, the doctrines of *Galiani*, whose book is written in favour of the freedom of the neutral flag, while his opponent supports the opposite doctrine, so strenuously contended for by *Great Britain*. These two works were written at the close of the *American* war; the one at *Naples*, which was at that time under *French*, and the other in *Tuscany*, which was under *British* influence. See *GALIANI*.

LOCCENIUS (*Johannes*), author of a valuable treatise in three books, entitled, *De jure maritimo & navali*. It has been published by *Heineccius*, together with *Styftman's Jus maritimum & nauticum*, and *Kuricke's Diatribe de Assesurationibus*, under the title of *Scriptorum de jure nautico & maritimo Fasciculus*, in two vols. 4to. *Hal. Magdeb.* 1740.

MARQUARDUS (*Johannes*), a *German*, is the author of a very learned treatise on mercantile law, in the *Latin* language, entitled, *Tractatus politico-juridicus de jure mercatorum & commerciorum singulari*, in 4 books, printed at *Frankfort*, in 1662, folio, 1316 pages. It contains a number of public documents, historical facts, and other valuable information.

MENOCHIUS (*James*), a lawyer of *Pavia*, in *Italy*, was so learned, that he was called the *Baldus* and *Bartholus* of his age; no con-

temptible names among the civilians. He was president of the superior court of *Milan*, and died in 1607, at the age of 75. Among a variety of professional works which he published, and were much read in his time, he wrote a treatise in folio, *De arbitrariis Judicium questionibus & causis conciliorum*, which is the work to which our author refers in his 25th chapter, page 196.

MERCATURA (*De*), a large and valuable collection of treatises and dissertations, by various authors of different nations, on subjects of maritime and commercial law. It is entitled, *De Mercatura, Decisiones & Tractatus varii & de rebus ad eam pertinentibus*, 1 vol. fol. Colon. 1622. It contains, amongst other things, the treatises of *Straccha* and *Santerna*, and the little tract of *Cuneus*, mentioned in this book; (See STRACCHA, SANTERNA, CUNEUS.) It contains also, a collection of the decisions of the court of *Rota* of *Genoa*, on subjects of mercantile law, to the number of 215, much in the manner of our common law reports: See *Ingersoll's Roccus*, p. 53. in not. The remainder consists of a number of other tracts on similar subjects, by various authors, which, as they are not mentioned in this book, we think it unnecessary to notice here.

MORNAC (*Anthony*), a *French* advocate, who died in the year 1619. He wrote a great number of professional works, which were published at *Paris*, in 1724, in four vols. folio. He was a man of great erudition.

NOODT (*Gerardus*), of *Nimeguen*, was a *Dutch* professor, whose writings on the *Roman* law, are in very great repute among the civilians. His works have been edited by *Barbeyrac*, the celebrated commentator of *Puffendorff* and *Grotius*, and printed at *Leyden*, in two folio volumes, under the title of *Gerardi Noodt, Noviomagi, Jurisconsulti & Antecessoris, opera omnia*. Lugd. Bat. 1760.

OMPTEDA (*Henry Lewis, Baron von*), was ambassador of the king of *Great Britain*, as elector of *Hanover* and duke of *Brunswick-Lunenbourg*, to the Diet of *Ratisbon*, and his minister plenipotentiary to the electoral court of *Munich*. He is the author of an excellent work in the *German* language, entitled, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, or *Literature of the natural and positive law of nations*; *Munich*, 1785, 2 vols 8vo. It is a biographical, critical and bibliographical notice of the various authors who have written on the law of nations, and of their works, down to the time of its publication, arranged in a very methodical order.

ROCCUS (*Franciscus*), a *Neapolitan*, author of the celebrated

NOTABELLA *de navibus et nauticis; item de assicurationibus*. An excellent *English* translation of this well known work, the original of which is very scarce, has been lately published, with valuable notes, by *Joseph Reed Ingersoll*, esq. counsellor at law of this city; one vol. 156 pages, octavo; *Philadelphia, Hopkins and Earle*, 1809. This translation is executed with great judgment and accuracy, and may, in our opinion, well supply the place of the original.

SANTERNA, (*Peter*) a *Portuguese* writer, author of a treatise upon Insurance, entitled, *Tractatus de assicurationibus et sponsonibus Mercatorum*. See **MERCATURA** (*De*).

STRACCHA (*Benvenuto*), an *Italian* writer, author of a valuable treatise on the law of merchants, entitled, *De Mercatura, seu Mercatore*. See **MERCATURA** (*De*).

US ET COUTUMES DE LA MER. See **CLEIRAC**.

VALIN (*René Josué*), was born at *Rochelle*, in *France*, where he exercised the profession of an advocate, and was king's attorney, in the court of admiralty, and in the municipal court. He was also a member of the academy of that city, where he died in 1765. His celebrated commentary on *Louis XIV.*'s *Ordonnance de la marine*, published at *Rochelle*, in 1760, in two vols. 4to. is well known in the *United States*; but few are acquainted in this country with his *Treatise on Captures*, published at the same place, in 1763, in one vol. 8vo. This excellent work, worthy of the high reputation of its author, is unfortunately out of print; the copy which we have in our possession, was the last which remained two years ago in the bookseller's store, at *Rochelle*. It is to be hoped that a new edition of it will soon be published.

VERWER (*Adriaan*), author of a work in the *Low Dutch* language, entitled, *Nederlants See Rechten, Averyen en Bodemeryen* or *The maritime law of the Netherlands, and the law of average and bottomry*. It contains, 1. The laws of *Wisbuy*, and the ordinance of *Amsterdam*, with notes. 2. Several ordinances of the *Spanish* kings, sovereigns of the *Netherlands*. 3. A treatise on the law of bottomry. 4. A treatise on average, by *Quintijn Weijtsen*, with an index to the whole. The edition before us was printed at *Amsterdam*, in 1764.

ZENTGRAVIUS (*John Joachim*), was professor of divinity at *Strasburg*, and wrote in 1684, a dissertation, entitled, *De origine, veritate et obligatione juris gentium*, in which he maintained against *Puffendorff*, the existence of a *positive law of nations*; a controversy which called forth the abilities of several writers at that time, but

at this day appears little more than a dispute about words. *Zenagravius* also wrote a dissertation on *Commerce between neutrals and belligerents*. Strasb. 1690.

ZOUCH (*Richard*), an *Englishman*, born in 1590, in *Wiltshire*, was professor of civil law in the university of *Oxford*, and was made judge of the high court of admiralty, by *Charles II.* at the restoration, in 1660. He wrote some elementary tracts on the civil law, and distinguished himself in the celebrated controversy which took place in that reign, on the subject of admiralty jurisdiction, and was principally managed on the part of the civilians, by himself, *Dr. Exton*, and *Dr. Godolphin*. He wrote a treatise on the law of nations, entitled, *Juris & Judicii Fecialis sive juris inter gentes & questionum de eodem explicatio*, in which he does little more than retail the opinions, and often copies the very words of *Grotius*. Although this work is frequently quoted by our author, he appears to have been sufficiently sensible of its want of real merit. It was published at *London*, in 1650, in 4to.; and at the *Hague*, in 1659, in 16mo.

A TABLE
OF
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TABLE

OF

REFERENCE,

TO enable the reader to find in their numerical order, and by the books to which they respectively belong, the several titles of the *Institutes*, *Digests*, and *Code*, quoted in this work.

INSTITUTES.

De rerum divisione & adquirendo ipsarum dominio. Lib. 2. tit. 1.

DIGESTS.

☞ The titles in italics are translated into English in the *American Law Journal*.

De adquirendo rerum dominio, lib. 41. tit. 1.

captivis & postliminio, lib. 49. tit. 15.

collegiis & corporibus, lib. 47. tit. 22.

distractioe pignorum, lib. 20. tit. 5.

exercitoria actione, lib. 14. tit. 11. (3 *Am. Law Journ.* 462.)

institoria actione, lib. 14. tit. 3.

jure Fisci, lib. 49. tit. 14.

nautico fenore, lib. 22. tit. 2. (3 *Am. Law Journ.* 158.)

noxalibus actionibus, lib. 9. tit. 4.

origine juris, lib. 1. tit. 2.

publicanis & vectigalibus, lib. 39. tit. 4.

ritu nuptiarum, lib. 23. tit. 2.

Locati, conducti, lib. 19. tit. 2.

Si quadrupes pauperiem fecisse dicatur, lib. 9. tit. 1.

CODE.

De legibus, & constitutionibus principum, lib. 1. tit. 14.

nafragiis, lib. 11. tit. 5.

Ne uxor pro marito, &c. conveniatur, lib. 4. tit. 12.

☞ The four works which compose the body of the civil law, to wit: the *Institutes*, *Digests*, *Code* and *Novels*, are divided into *Books*, *Titles*, *Laws* and *Sections* or *paragraphs*, and are generally quoted by the *English* civilians, by referring to those divisions, as for instance, *Dig.* l. 1. tit. 4. l. 5. § 7., and sometimes *Dig.*, *D.*, or

ff. 1. 4. 5. 7., for *Digest*, *Book* 1., *Title* 4., *Law* 5., *Section*, or *Paragraph* 7. The civilians on the continent of *Europe*, on the contrary, quote the heading of each title, and then refer only to the numerical subdivisions of *law* and *paragraph*; sometimes even, they quote the first words of the *law*, and refer to the *paragraph* only by its number. Thus our author, page 41, refers generally to the law *non omnium*, which is the twentieth *law* of the third *title* of the first *book* of the *Digests*. The references in this work being all by the heading of the *title*, and not referring to its *number*, or to that of the *book* in which it is contained, the foregoing table is presented to our readers, that they may with greater ease turn to the several titles of the books of the *Roman* law, which are quoted, or referred to in the course of this work.

ON THE
LAW OF WAR.

CHAPTER I.

Of War in general.

WHEN Cicero said, l. 1. *de Offi.* c. 11., that there are two kinds of contests between men, the one by argument, and the other by force, by the latter of these he undoubtedly meant war; though he did not intend, as Grotius would have it,* to give thereby a definition of that state of things. Such a definition would be imperfect, as is clearly that of Albericus Gentilis, who defines war, l. 1. *de Jure Bell.* c. 2., a just contention of the public force. Both these definitions, although the first and the least perfect is approved of by Grotius, are defective; and the reader will be convinced of it by attending to the following which I have myself attempted, and which, if I mistake not contains all the ingredients which constitute a state of war. WAR, then, is a contest carried on between independent persons, by force, or fraud, for the sake of asserting their rights. Let us now proceed to examine it in detail.

I have said that war is a contest. By this word I have not meant to express merely the act of fighting, but that state of things which is called war; for if the thing itself be defined with sufficient accuracy, its incidents will necessarily follow. Thus jurists have defined slavery, not merely the act by which freemen are subjected to the dominion of others, but the very state and condition of servitude. Grotius himself has attended to this distinction in his definition of war, which he borrowed from Cicero.

* De Jure B. ac P. l. 1. c. 1. § 2. n. 1.

War is also a contest *between independent persons*. This applies not only to nations, but to individuals not living in a state of society; for both are equally independent. Nor can this war between individuals be called a private war; because the word *private* can only be used in contra-distinction to the word *public*, which cannot apply where there exists no society. Wherever men are formed into a social body, war cannot exist between individuals; the use of force between them is not *war*, but a trespass, cognisable by the municipal law. Thus, if I extort from my debtor the ten pieces which he owes me, I incur the penalty of the Julian law against private force; because beating and wounding do not alone constitute *force* in the sense of the prohibition, but it applies to every case in which a man obtains even what belongs to him, by any other than legal means. *L. 7. ff. ad L. Jul. de vi privatâ.*

War is a contest *by force*. I have not said by *lawful force*, for in my opinion, every force is lawful in war. Thus it is lawful to *destroy* an enemy, though he be unarmed and defenceless; it is lawful to make use against him of poison, of missile weapons, of firearms, though he may not be provided with any such means of attack or defence; in short, every thing is lawful against an enemy. I know that *Grotius** is of a different opinion with regard to the use of poison, and that he distinguishes between the different kinds of missile weapons.† I know that *Zouch*, who hardly ever decides upon any point, is in doubt upon this question.‡ But if we take for our guide nature, that great teacher of the law of nations, we shall find that every thing is lawful against an enemy as such. We make war because we think that our enemy, by the injury that he has done us, has merited the destruction of himself and of all his adherents. As this is the object of our warfare, it is immaterial what means we embrace to accomplish it. A judge will not be called unjust who orders a convicted criminal to be put to death by the sword of the executioner, though he be unarmed and bound with chains; for if

* L. 3. c. 4. § 15. † § 18. ‡ Part 2. § 10. Q. 5 & 6.

he should unbind and arm him, it would no longer be the punishment of a crime, but a trial of courage and good fortune. If you think that you ought only to make use of the same weapons against your enemy that he himself makes use of against you, you must at the same time be of opinion, that his cause is equally good with your own, and therefore that he is entitled to the same advantages. But on the contrary, your enemy stands with respect to you, in the situation of a condemned culprit; and so indeed you stand with respect to him; though in the eyes of third persons, who are friends to both parties, your cause and his are equally just, and you are both equally in the right.

Nor ought *fraud* to be omitted in a definition of war, as it is perfectly indifferent whether stratagem or open force be used against an enemy. There is, I know, a great diversity of opinion upon this subject: *Grotius* quotes a variety of authorities on both sides of the question.* For my part, I think that every species of deceit is lawful, perfidy only excepted; not that any thing may not lawfully be done against an enemy, but because, when a promise has been made to him, both parties are divested of the hostile character as far as regards that promise. And indeed when the reason of war admits of every mode to destroy an enemy, we cannot account for so many authorities and precedents against making use of fraud or deceit, but that as well the writers on the law of nations as the leaders of armies improperly confound *justice*, which is the object of our present inquiry, with *generosity*, which is not uncommon among warriors. Justice in war is indispensable; but generosity is altogether a voluntary act. That leaves us at liberty to destroy an enemy by every possible means; this grants to him every thing that we would wish to be granted to ourselves in the like case; and thus war is carried on as a duel formerly was in those countries in which that mode of terminating differences was admitted. Justice permits the use of numerous armies, of machines, firearms and other imple-

* L. 3.c. 1. § 6. &c.

ments of war, that the enemy is not possessed of; while generosity, on the other hand, forbids it. Justice permits every kind of deceit, except perfidy, as I have before mentioned; generosity does not admit of it, perhaps even though it be employed by the enemy; for cunning is a token of fear, while the magnanimous mind is never afraid. *St. Augustine* says,* "that when a just war is undertaken, it is of no consequence whether it be carried on by fraud or open force." This clearly applies to justice, and it is in fact justice that he treats of. But when the *Roman* consuls wrote to king *Pyrrhus*: "*We do not wish to contend with you by means of bribery or fraud,*"† and at the same time gave him notice of the offer that had been made to them to poison him, they certainly did an act of the greatest generosity.‡ Many nations have often preferred generosity to justice; others have preferred justice to generosity: the *Romans* themselves sometimes displayed the one, sometimes the other. If then, as I have said before, authorities and precedents are reconciled, the point will be clearly settled by recollecting that *justice* may always be insisted upon, though *generosity* may not.

Lastly, the definition says, *for the sake of asserting their rights*. That is to say, in order to defend or recover what is our own; for that is the sole *cause*, though I do not mean to say that it is the *end* or *object*, of war. A nation which has injured another, is considered, with every thing that belongs to it, as being confiscated to the nation that has received the injury. To carry that confiscation into effect may certainly be the object of the war, if the injured nation thinks proper; nor is the war to cease as soon as she has received a reparation or equivalent for the injury suffered. The whole commonwealth, and all the persons as well as the things contained within it, belong to the sovereign with whom we are at war, and in the same manner as we may seize upon the person and upon all

* Quest. 10. in *Josua*.

† *Aul. Gell. l. 3. c. 8.*

‡ The *British* government acted with equal generosity, when, by their minister, *Mr. Fox*, they gave notice to the first consul of *France*, of the offer which had been made to them to assassinate him. T.

the property of our debtor, so a sovereign in war may seize the whole of the subjects and dominions of his enemy. It is true that we can recover no more of a debtor than what he actually owes us; but in war all social ties are dissolved between states. We make war to subdue the enemy and all that belongs to him, by occupying every thing which belongs to the sovereign of the hostile country, and exercising dominion over all the men and things that are contained within his territories; for war is of so general a nature that it knows no measure or bounds.*

* The Translator has taken the liberty to transpose this paragraph for the sake of perspicuity. As it stands in the original, it ought to come in at the beginning of page 2, of this translation, but as it explains the *last* member of our author's definition, it seems best placed at the end. T.

CHAPTER II.

Of a Declaration of War.

MANY things are required by writers on the law of nations in order to make war lawful, and particularly, they think it necessary that it be publicly declared, either by a special proclamation or manifesto, or by sending a herald. This opinion certainly accords with the practice of the modern nations of *Europe*, and it is perfectly clear, that before recourse can be had to arms, a demand of satisfaction should be made for the injury complained of. But this is not the question now before us; it is whether after a reparation has been demanded and refused, war can be immediately made without a previous declaration?

*Albericus Gentilis** is of opinion that it cannot; that a war ought not to be secretly commenced, and that the adverse party's friendship is to be publicly renounced. It is true that by the law of nature there is no necessity for a declaration of war. *Grotius*† is of that opinion and quotes several authorities in support of it. He contends only that the law of nations requires that a demand should be made, by which it may appear that the party is forced into a war by the refusal of a satisfaction which cannot be otherwise obtained. As to declarations of war,‡ he thinks they have been introduced in order that it should appear that the hostilities which are committed are the acts of the whole nation, or of the sovereign, and not merely of daring individuals. *Puffendorff*§ and *Huberus*|| are of the same opinion, and support it by the same arguments. Other writers, and among them *Gentilis*¶ and *Zouch*,** think that a declaration of war is necessary, but that it may be dispensed with in certain cases. *Hertius*†† does

* De Jure Bell. l. 2. c. 1.—† L. 3. c. 3. § 6. n. 1. & 2.—‡ C. 3. § 11.—§ De Jure N. & G. l. 8. c. 6. § 9. 15.—|| De Jure Civitatis, l. 3. § 4. c. 4. n. 27.—¶ De Jure Belli, l. 2. c. 2.—** De Jure int. gent. P. 2. § 10. Q. 1.—†† Adnot. ad Pufend. l. 8. c. 6. 9.

not deny that the custom of declaring war has been handed down to us by the *Germans*, but at the same time he is of opinion, that that custom is not obligatory, and that nothing can be said of those who do not conform to it but that they are not to be considered as the most civilized nations.

Christian Thomasius,* a man of sound judgment, considers, in my opinion very properly, a declaration of war as an act of mere humanity, to which no one can be compelled; and he asks, with reason, what difference there is between a war that has and one that has not been declared, and whether there is a different law for the one and for the other? He does not agree with *Grotius*,† who, quoting a passage from *Dion Chrysostom* "that wars most frequently take place without a previous declaration," is of opinion that such wars are lawful only by the law of nature. On the contrary, he asserts that they are justified by the law of nations, and immediately afterwards he adds, that this is a question of so interesting a nature that it deserves to be made the subject of a special dissertation.

I shall not, however, undertake to write a dissertation upon it, but I shall devote to its investigation the contents of the present chapter. My opinion is that a declaration of war is not necessary, and that it is one of those things which may very properly be done, but which cannot be insisted upon as a matter of right. A war may begin by mutual hostilities as well as by a declaration. The states-general appear to have understood it so, when by their ordinance of the 17th of *January* 1665 they declared, that the *Dutch* ships taken by the *English* might be claimed, because they had been captured before a declaration of war, and *before the commencement of hostilities on the part of the Dutch*. War may be justly begun upon the denial of a just demand; for how does that differ from actual hostility? I admit, in the fullest extent, that it is necessary in the first instance to make a demand of what we conceive to be due to us, but not that we are to accompany that demand with threats of hostility, or with an actual de-

* Ad Huberum de Jure Civitat. l. 3. § 4. c. 4. n. 27. † Ibid. § 6. n. 1.

claration of war. What *Grotius* says about *interpellatio* applies to a demand only; but what he says afterwards about a public declaration, *denunciatio*, cannot be applied in like manner. Nevertheless, it was from his and other's prejudices, although not at all consonant to reason, that this subject, otherwise very clear, began to become obscure. Yet it must have been evident, that where there is no judge between the parties, as is the case with princes, every one may forcibly retake that which belongs to him and has been unjustly taken away from him by another, who refuses to make restitution. This being the case, every one is at liberty to make or not as he pleases a declaration of war; the necessity of such a solemnity can only have been established by an agreement which between nations has no obligatory force.*

Nations however, and princes, who are impressed with sentiments of magnanimity, are not willing to make war without a previous declaration. They wish by an open and manly attack to render victory more glorious and more honourable. But here I must repeat the distinction between justice and generosity, which I have laid down in the preceding chapter: the former permits the use of force without any previous notice; the latter considers every thing in a nobler point of view, deems it inglorious to subdue an unarmed and unprepared enemy, and considers it an unworthy act to attack and despoil of a sudden those who have come among us on the faith of the public peace, which happens to be suddenly broken, perhaps without their fault. Hence *Polybius*, l. 13. c. 1., praises very highly the custom of declaring war; which was peculiar to the *Achaians* and to the *Romans*, and he praises them in the same manner for abstaining from fraud and deceit in war; but his praise in both instances is due only to their generosity.

Speaking of the *Achaians*, *Polybius* adds, that they had also appointed a particular place to fight their battles in, precisely

* *Non nisi conventionē, quæ inter Gentes nulla est.* Our author probably means here that such an agreement has no force, *except between the parties to it*; otherwise, he would appear at variance with himself. See pp. 3. 13. 17.

as we read of certain counts of *Holland*, who in ancient times, when they intended to go to war, not only gave notice of it by a public declaration, but appointed the time and place of combat. This appointment of time and place *Grotius** himself acknowledges to be unnecessary, and yet he urges a declaration as if it were indispensable. If you inquire into the reason of this difference, you will find no other but that it is not at present customary in *Europe* to appoint the time and place of combat. Whence it appears, that *Grotius*, in writing his book on the law of war and peace, has not so much written of the universal law of nations, as of the customs and manners of most of the *European* countries, which, as he himself teaches us,† do not constitute the law of nations. But on other points as well as on the present he has extracted the law of nations from customs and manners alone; so that when he has found these to differ on any particular question, he has hardly ever ventured to decide upon it.

From what *Polybius* said, however, that it was an honour peculiar to the *Achaians* and *Romans* that they did not make war without a previous declaration, we sufficiently understand that what is said by *Dion Chrysostom*, that war is *most frequently* NOT declared‡, is certainly true; not merely because it is not required by the law of nature, but because such is the custom or usage of nations. And indeed a declaration of war was not so frequent among other nations, as among the *Romans* and *Achaians*. Nor was such a declaration made by either party when the other nations of *Greece* waged war with the barbarians or with one another; nor do we read of the *Jews*, who went to war by *God's* command, that they ever declared war against their enemies. Neither did the *Macedonians* make a public declaration of war when they destroyed

* L. 3. c. 3. § 11.

† L. 2. c. 8. § 1. n. 1 & 2.

‡ In the original, this passage from *Dion Chrysostom* is quoted so as to mean, that war is *most frequently* DECLARED, (*bella indicta iuxta τὸ πλῆθος, ut plurimum*) but from the context it appears evidently to have been an error of the press. The words of *Chrysostom* are: πόλλοι οἱ ἐν τῷ πλῆθει ἈΚΗΡΤΗΤΟΙ γίνονται. Wars are *most frequently* made WITHOUT a public declaration, and so our author translates them very correctly above, page 7. T.

year 1598, the *Belgians** were allowed a free intercourse with *Spain*. But of the truth of this fact I have never been able to satisfy myself, and admitting it to be true, I cannot see how it applies to the justice of the present case, as I shall shew hereafter. If the *Belgians* thus carried on a free trade and intercourse with *Spain*, it could not be by force of the laws of war, but rather by the negligence of the magistrates. Indeed it is stated in the preamble to the edict, by which on the 4th of *April* 1586, the earl of *Leicester*, with the advice of the states-general and their counsellors, prohibited the *United Belgians* from trading with the *Spaniards*, that the king of *Spain* had already condemned and sold *Belgic* vessels, both in *Spain* and *Portugal*. And in the first section of the said edict of 1586; as well as by another edict of the 18th of *July* in the same year, the earl of *Leicester* actually forbids all commercial intercourse with the *Spaniards*. It is true, that by the first section of the edict of the 4th of *August* following he restricted the prohibition to trading with those places within the *Belgic* territory, which were in the possession of *Spain*, and permitted carrying on trade with *Spain* proper; but this was done for no other cause than for the advantage of the *Belgic* merchants, which brought no alteration in the laws of war, which could not be changed without the consent of the *Spaniards*.

Even if a declaration of war had been necessary, it would not have availed the *Belgians* any thing to prevent the condemnation of their vessels. For what if the *Spaniards* in that very year 1598 had solemnly declared war against the *Belgians*, and immediately afterwards condemned their vessels, perhaps the same day? They might have done this conformably to the laws of war; nor indeed are the *Belgians* or any other power, when a war suddenly breaks out, in the habit of giving notice to the subjects of their enemies to withdraw their effects and property, or otherwise that they shall be forfeited. No one ever required this; on the contrary, *Tryphonius*, in l. 12. pr.

* Our author, when referring to the times of the *Dutch* revolution, calls indiscriminately *Dutch* and *Belgians* those *Netherlanders*, who were in insurrection against *Spain*. Several of the now *Belgic* provinces were at times in possession of the insurgents.

ff. de Capt. & Postlim. Revers., lays down the contrary position. And such is the practice of all nations, unless there be a special convention to the contrary, which is sometimes the case. There are a few examples of similar compacts. In the fourth article of the treaty of *Utrecht* with *Muyden* and *Weesp*,* of the 1st of *July* 1463, it was agreed that the peace should last fourteen days, *after we the said city and cities shall have written to each other, within which fourteen days it shall be lawful for our respective subjects to withdraw their goods and effects from the territory of their enemies.* In the sixteenth article of the treaty of peace between the king of *Portugal* and the *States-general*, of the 6th *August* 1661, it is stipulated, that if differences shall arise between the said king and states, it is so to be declared, and within two years from that declaration it will be unlawful to do an injury to the property of the subjects of either party. After it had been agreed in the year 1662 between *France* and the states-general, that in case of a war taking place the subjects of either party should be allowed six months to withdraw their property from the territory of the other, the king of *France* having declared war against the *Dutch* in the year 1672 issued a special edict declaring that the convention of 1662 should be observed. The same term of six months was granted for the same purpose by the same powers to each other by the fifteenth article of the peace of *Nimeguen*, of the 10th of *August* 1678, nine months by the thirty-ninth article of the marine treaty of the 10th of *August* 1678, nine months again by the fourteenth article of the treaty of peace of the 20th of *September* 1697, and again nine months by the thirty-sixth article of the treaty of peace of the 11th of *April* 1713. And in the thirty-second article of the treaty of peace between *England* and the states-general, of the 31st of *July* 1667, it was stipulated, that if war should arise between the parties, the effects of their respective subjects found in the

* *Muyden* and *Weesp*, or *Wesp*, are two towns of *South Holland*: the former is situate at the mouth of the river *Vecht* (a branch of the *Rhine*) and the latter a few miles above it on the same river.

territories of each other should not be condemned, but six months should be allowed to take them away. If these examples should not be sufficient, I could adduce several others mentioned by *Zentgravius*, *de Orig. Verit. & Oblig. Jur. Gent.* art. 7. § 9. Where, however, there do not exist similar conventions for suspending the state of war, whatever others may say, hostilities may commence immediately. *Grotius*, who requires a declaration, does not require any interval between it and the beginning of hostilities. See l. 3. *De Jure B. & P.* c. 3. § 13. *Zouch* and *Zentgravius* are of the same opinion. *Zouch*, *de Jur. int. gent.* part 1. § 6.* and *Zent.* d. loc. The king of *Spain*, therefore, might in the year 1598 have declared war and immediately afterwards taken the *Dutch* ships, as there was no convention between the two powers to the contrary, nor indeed could there be any between that sovereign and a people whom he considered as his subjects.

Here then is a remarkable instance of a war carried on for a great length of time without ever having been declared. Indeed, I do not know how the *Belgians* could have required a declaration of war from the *Spaniards*, when they themselves never issued any, either at the commencement of hostilities, or when they were resumed after the expiration of truces. Nay, even admitting that such a declaration was indispensably required by the law of nations, the *Spaniards* might perhaps have objected that it was only necessary when war took place between independent princes, but that it was never used in a civil war, in which case it was perfectly lawful for a sovereign to take the property of his rebel subjects. But I do not urge this argument. It is sufficient for my purpose if I make it appear that the edict of the 4th of *March* 1600 was not predicated on the laws of war, but on the interest of the *Dutch* merchants. It was the same interest which influenced the *Hollanders* in the year 1639, and set them improperly at variance with the states-general, in another case which was no less dependent on the laws of war. For the governor of the

* Our author here quotes *Zouch*, § 3. Q. 10. without referring to the part. It is evidently a misquotation. The true reference (which we have restored) is to part 1. § 6.

Canary Islands having been taken by treachery and brought into this country, and the states-general being desirous of detaining him as a prisoner, the *Hollanders* opposed it; but, says *Aitzema*,* merely on the ground of its being detrimental to their trade. For my part I think that they might well have founded their opposition on the merits of the case itself: as this was a much more shameful act than the condemnation of the *Dutch* vessels by *Philip II.* in 1598; for although an enemy's property may be taken and hostilities may be committed immediately upon a declaration of war, if there are no treaties to the contrary, yet it is in no case lawful to betray a friend. The *Dutch* had hitherto been admitted to trade freely with the *Canary Islands*, and there was on both sides a free commercial intercourse. A *Dutch* captain, who had been thus admitted to trade, persuaded the governor to go on board of his vessel, under pretence of carrying him from one island to

* Lib. 19. As this writer is frequently quoted in the course of this work, we think it proper to give some account of his writings to the *American* reader. LEO VAN AITZEMA is the author of an excellent Chronicle of the events which took place during the middle part of the seventeenth century, from 1621 to 1668. This work is published in six thick folio volumes, (with an additional volume containing political tracts,) and contains an immense collection of state papers, during the period to which it refers, which are connected together by the author's narrative. It is divided into books, each book containing a recital of the public events and a copy of the public documents of one year. It has been ably continued on the same plan by *L. Sylvius*, in four folio volumes, down to the peace of *Ryswick*, in 1697. This book, as well as its continuation, is entitled *Saken van Staet en Oorlogh*, (*Of matters of State and War*). Unfortunately it is written in the *Low Dutch* language, which is understood but by few among us. A translation of it into *English* would be a great acquisition to literature, and prove an invaluable mine of historical knowledge. From the manner in which the public documents that it contains are connected and introduced by short historical narratives, it is superior to any collection of state papers that has ever appeared. It combines the advantages of such a collection with those of a chronicle of the times, which, we believe, are not to be found together in any other work extant. There are two editions of *Aitzema*, one in *folio*, the other in *quarto*. The latter is that from which our author has taken his quotations, to the paging of which he refers. Being possessed only of the *folio* edition, we have thought it best to refer merely to the *book* in which each particular passage is to be found. T.

another, instead of which he carried him to *Rotterdam* in order to make him a prisoner. This appears to me to be precisely the same as going to an enemy under the protection of a flag of truce, with an intention however to seize upon the first favourable opportunity to take away his life.

But let us pass on to other wars commenced and carried on without any declaration. It is well known that when *Gustavus Adolphus* invaded *Germany*, the emperor *Ferdinand II.* complained that he had done it without a previous declaration of war, upon which *Gustavus* replied that the emperor himself had before invaded *Prussia* without any such declaration. It is thus that princes, though bound by no positive law, enforce upon each other the law of reciprocity. The same thing happened in the year 1657; for the *French*, in the midst of peace, having detained the goods of *Dutch* subjects which they had in their own country, the *Dutch* detained in like manner the goods of *French* subjects. See the edict of the states of *Holland* of the 26th *April*, and the decree of the states-general of the 6th of *May* of that year. Indeed the states-general lay it down in their said decree that such a detention among friends is unlawful, unless for a just cause, and unless there has been a previous demand and denial of justice. But no prince will detain the property of foreigners, unless for a cause which he himself thinks just. Certainly I would admit of a demand, because a cause of complaint cannot otherwise be known; but since the common use of resident ambassadors, which now obtains, there can be but few cases of injury of which a complaint is not made; for ambassadors are in the habit of making frequent representations, if the smallest thing happens by which their sovereign may be offended. But let us proceed.

We read of the *Portuguese*, that in the year 1657 they seized the ships of the *Dutch* before any war declared or hostilities commenced. And in the war which took place between the king of *England* and the states-general, which ended in the peace of 1667, the states-general, in the letter which they wrote to the king of *England* on the 16th of *September* 1666, complained that a great deal of property was taken from them and their subjects; unlawfully, said they, because war

had not been declared. But of this the reader will judge from the reasonings which I here adduce. *Louis XIV.* also, in the year 1667, did not declare war against the *Spaniards*, and yet, as it were, without breaking the peace, he ordered the king of *Spain* to be expelled from dominions that he was possessed of, being of opinion that there was no need of a declaration to take what belonged to him. Now, if a declaration is necessary in any case, who, I ask, will put up with such a pretext? For to make war is nothing else than to take forcibly from an unwilling prince or people what we think to be justly due to us. There is a long complaint on this subject in the edict of the states-general against *France*, of the 9th of *March* 1689,* because the same king of *France* had, in the year 1688, without any declaration of war, detained the *Dutch* subjects and their ships and merchandize, and afterwards, immediately on the declaration of war being published at *Paris*, he took up arms, and seized on the goods of *Dutch* subjects.

The first part of this complaint was indeed just; for that detention was a violation of the fifteenth article of the peace of *Nimeguen* and of the thirty-ninth article of the *Marine* treaty of the 10th of *August* 1678, the period stipulated by those several instruments, as above mentioned, for carrying off the effects of the respective parties, not being expired, so that the state of war was in this respect suspended. It was therefore an act of injustice to capture such goods as might have been carried off within the limited time. As to other goods, there was no treaty concerning them, and therefore I doubt whether the second part of the complaint was equally well founded. But however this may be, the instances which I have adduced are sufficient to prove that there is no reason why we should think so favourably of *European* manners, as to refer to them for a convincing proof of the necessity of declaring war.

* Sylv. contin. of Aitzema, b. 25.

CHAPTER III.

Of War considered as between Enemies.

IT may be said that a state of war ought rather to exist among princes for whose interest alone in most cases it is carried on, than among their subjects, who, unless the war is made for their own quarrel, are not actuated by so hostile a spirit. Yet when hostilities are to be waged against another nation, no one can expect that we shall compliment our enemies and wish them well. The grave majesty of the *Roman* people displayed itself in the conduct of *Caius Popilius*, who, although he was saluted by king *Antiochus*, then his enemy, refused to return the salutation while the war continued. So we are told by *Plutarch*, *Apophthegm*, p. m. 364.: *Livy*, b. 45. c. 12., and *Polyb. Excerpt. Legat.* c. 92., relate likewise, that *Antiochus* offered his hand to *Popilius*, who refused to take it.

The *Roman* consuls however, in their letter to king *Pyrhus*, with whom they were at war, as related by *Gellius*, b. 3. c. 8., wished him health. This perhaps was necessitated by the state of *Roman* affairs at that time, but so addicted to flattery has the last century been, as well as the present, that princes omit none of the usual adulatory forms even in the midst of war. Hence enemies now wish to each other every kind of prosperity, call each other friends, and are almost sorry for their mutual losses. This is exemplified in the letters of the states-general to the king of *England*, of the 10th of *July*,* 16th *September*,† and 26th of *November*, 1666; and again in the letters of the king of *England* to the states-general of the 4th of *August*,‡ and 4th of *October* 1666. Although the two nations were at that time at open war, and bent upon mutual injury, yet the states-general write in their said letter of the 10th of *July* 1666, *que les offices de civilité ne*

* Aitz. b. 46.

† Aitz. *ibid.*‡ Aitz. *ibid.*

sont pas incompatibles avec les devoirs de la guerre,—that an interchange of civilities is not incompatible with the duties of war. And the king of *France*, in the year 1666, who was then at war with the king of *England*, sent an ambassador to condole with him on the conflagration of the city of *London*. It is certainly noble to practise the duties of humanity, clemency, piety and other magnanimous virtues in the midst of war; but I think it disgusting to trifle with mere words, for what else is it than trifling when you express sorrow for the conflagration of a city to which you would wish to set fire yourself?

As the conqueror may lawfully do any thing that he pleases with the vanquished, no one can doubt his having on that account over him the power of life and death. There are so many instances on record of the exercise of this right amongst all nations in ancient times, that a large book would not be sufficient to contain an account of them all; and the publicists have already exercised their industry upon this subject. But although the right of killing has almost become obsolete, yet it is to be attributed merely to the will and to the clemency of the victor; nor can it be denied but that it might be exercised even at this time, if one should chuse to avail himself of his right. That there still exist some remains of this right is in full proof; for in this sense alone is to be taken and on this ground alone is to be defended the edict of the states-general of the 1st of *October* 1589, which inflicted the penalty of death on those who should be found with the traitors of *Gertruydenberg*; and also their other edict of the 24th *February* 1696, by which they inflicted the same penalty on those enemies who should approach the shore nearer than the buoys, or should land on the coast for the sake of plundering.

One who is in company with his fellow soldiers is not guilty of any crime by the laws of war, though they be traitors, nor is he who invades a hostile shore in hopes of making booty. Drive him away if you can, but if you cannot, why will you treat him differently from other enemies? It is on the ground of the same right of life and death that I defend the conduct of the *Dutch*,* who sometimes hanged the

* Aitz. b. 6.

Spaniards because they were not ransomed, for so it is related to us. It is lawful to hang prisoners; but if it were not lawful, there is no reason or authority for doing it because they are not ransomed, but the contrary is practised, as will be seen hereafter.

To the right of killing our enemies has succeeded that of making them slaves, which was formerly exercised during many ages. But this custom of making slaves of prisoners has now fallen into disuse among most nations, in consequence of the improvement of their manners. *Cujacius*, indeed has said, *Comment. post. ad l. 5. ff. de Just. et Jur.*, that even among *Christians*, prisoners were still made slaves of; but that their servitude was milder than formerly. He however does not prove his position otherwise than by the right of redeeming. But why should the custom of redeeming prisoners and their detention until they are redeemed be considered as a species of servitude, any more than for instance the imprisonment of *foreign** debtors, until they pay what they owe to us? For in those cases such debtors are never discharged, unless they pay the money due, or give security for it, precisely as in the case of prisoners of war. Nay, prisoners of war, if they are not redeemed, are very often released, even without a ransom. Thus the supreme military council of the *United Provinces* on the 14th of *December* 1602, permitted the release of twenty-four prisoners, taken at the siege of *Boisleduc*, because they were not redeemed, and lest those unfortunate wretches should perish by the miseries of a gaol. It would have been very unexpected indeed, and quite contrary to the manners which now prevail, if the council had ordered those prisoners to be either hanged or made slaves of. Hence, when the rhingrave of *Solms*,† who served in the *British* army in *Ireland* in the year 1690, had ordered prisoners to be transported to *America*, there to be made slaves, the

* In *Holland*, foreigners alone and transient persons, who have no domicile in the country, are imprisoned for debt. T.

† Aitz. b. 30.

duke of *Berwick** gave him notice, that if this should be done, all the prisoners that he should make would be sent to the galleys in *France*. But as slavery itself has fallen entirely into disuse among christians, we do not inflict it upon our prisoners. We may however, if we please, and indeed we do sometimes still exercise that right upon those who enforce it against us. Therefore the *Dutch* are in the habit of selling to the *Spaniards* as slaves, the *Algerines*, *Tunisians* and *Tripolitans*, whom they take prisoners in the *Atlantic* or in the *Mediterranean*; for the *Dutch* themselves have no slaves, except in *Asia*, *Africa* and *America*. Nay, in the year 1661, the states-general gave orders to their admiral to sell as slaves all the pirates that he should take. The same thing was done in the year 1664.†

To the slavery of prisoners succeeded the custom of exchanging them according to their respective grades and ranks, and detaining them until redeemed.‡ And the necessity of redeeming them is sometimes expressed in treaties, with a specified sum, according to the dignity of each person that may be taken, which sum being paid, there is an end of that *summum jus* which belongs to the victors over their prisoners. Among the *Romans* the right of capture was exercised upon those who at the breaking out of the war were found in each other's territory, l. 12. ff. *de Capt. et. Postlim. Revers.*; but in modern times it rarely takes place, although the right still exists. Nay, *Louis XIV.* himself, king of *France*, when on the 26th of *January* 1666, he had declared war against *England* by sea and land, and interdicted all commerce between

* The duke of *Berwick*, a natural son of *James II.* of *England*, commanded at that time the *French* army in *Ireland*. He was afterwards commander in chief of the *French* forces in *Spain*, during the succession war, while the *British* troops were commanded by the earl of *Galway*, a *Frenchman*. T.

† Aitz. b. 41. 44.

‡ We are informed by the public papers that by a late cartel which has been settled between the *British* and *French*, sixteen *French* prisoners are to be given for every nine *British*, until the whole are regularly exchanged; it having been ascertained that the number of *French* prisoners in *England* exceeds that of the *English* in *France* in that proportion. T.

the two nations, in consequence of which the *English* who were in *France* were in fears for their persons and property, issued on the 1st of *February* 1666, another edict, telling them that their fears were vain; for that by the edict of the 26th of *January* 1666, he had merely declared war against those of the *English* who should be found thereafter on the high seas, or who should commit hostilities on the *French* territory, but not against those private individuals who had established their domicil in *France*; that however, it was his pleasure that *English* subjects residing in *France*, and who were not naturalized, should depart within three months, and go whithersoever they should please.

But that this is to be attributed solely to humanity, if there exist no treaties suspending the state of war, I have endeavoured to shew in the preceding chapter.* Because, however, there are many such treaties, the laws of war are seldom exercised upon those who have come in time of peace to a country where war afterwards has arisen, and have been found there at the time of the war's taking place. But after the expiration of the time which has been granted to them either by humanity or by treaty, those who remain in the country, or come into it without permission, may lawfully be arrested. On this principle, the states-general on the 4th of *April* 1674 issued an edict, that if any enemies should tarry within the *United Provinces* or the dominions of the states-general, without having obtained liberty to come, they should be arrested, and not be restored until redeemed.

But although the right of killing prisoners has fallen into disuse, it is made a question, however, whether it may not be, without the least imputation, exercised upon those who defend themselves too obstinately; and there are some who maintain the affirmative. But I think it would be a shameful action, unless the weak and defenceless girl, who obstinately

* On this principle, probably, the first consul of *France* arrested and detained, without any previous notice, all the *British* subjects who were found in *France* at the commencement of the present war. The principle may be correct; but if it is, it must be acknowledged that the *summum jus* of war is very near akin to barbarism.

resists the attempts of a libertine, should also be deemed deserving of punishment.

Every thing is lawful against an enemy, but nothing can be more cruel than to punish him for his courage. Nay, we even admire the courage of our enemies, and we are indignant at their cowardice. I remember to have read, that the *Algerine* corsairs tore to pieces and loaded with every kind of ignominy a certain captain who had meanly given up his vessel when she was in a condition very fit for defence, and had only stipulated for the liberty of his own person. For even with enemies fortitude is glorious and cowardice contemptible. If you wish to read what others have written upon this subject, you may be gratified by reading *Gentilis, de Jure Belli*, l. 2. c. 16.; *Grotius, de J. B. ac Pac.* l. 3. c. 4. § 13., and *Zouch, de J. Fec.** part 2. § 10. Q. 9.

We have laid down what it is lawful to do with living enemies, but what shall we say of the remains of those who are dead? In ancient times their bodies were abandoned to beasts and birds of prey, but now the conquerors either bury them themselves, or deliver them up to be buried. Sometimes even more is done for the sake of humanity. On the 16th of *September* 1666, the states-general caused the body of an *English* admiral which was in their power to be embalmed, and sent it over to *England*. They had before, viz. on the 10th of *July* 1666, written to the king of *England*, to know whether he wished that corpse to be sent thither or be buried in *Holland*, and on the 4th of *August* 1666 he chose the former. The *French* did the same thing in the year 1692.

There can be no doubt but that from the nature of war itself, all commercial intercourse ceases between enemies. For to what purpose will trade be carried on, if, as is clearly the case, the goods of enemies brought into our country are liable to confiscation? And if he who having obtained the right of killing his enemy should go with merchandize into the hostile country, and the enemy should kill him in the midst of

* This work is sometimes referred to by the title *De Jure Feciali*, sometimes by that *De Jure inter gentes*, which is indifferent, as it bears both titles.

commercial intercourse, would you think it justly done? But every commercial intercourse ceases. Hence in declarations of war commerce with the enemy is prohibited, and it is often done by subsequent edicts. By the eleventh section of the edict of the earl of *Leicester* of the 4th of *April* 1586, interdicting trade with the *Spaniards*, it is enacted that those who should carry on such commerce contrary to that edict should be hanged and their ships and goods confiscated, if they were subjects, but if foreigners, they should only be punished by the confiscation of their ships and merchandize. The same was enacted by the twelfth section of the edict of the said earl of the 4th of *August* 1586. And by the thirteenth section of the edict of the 4th of *April*, and the fourteenth of that of the 4th of *August*, the intention to carry on trade with the enemy was punished in the same manner as the fact itself, and thus the states of *Holland* had formerly enacted on the 27th of *July* 1584. It was moreover added to all those edicts, that there should be no prescription or limitation against the charge of having traded with the enemy, whether they were taken in the fact or not. And by the same edict of the states of *Holland* of the 27th of *July* 1584, the pecuniary penalties which it inflicts were to be recovered not only from the delinquent but from his heirs, which I do not believe to be conformable to the *Roman* law: for the offence provided against by these edicts does not, if we will be candid, amount to the crime of treason, but is a particular species of offence, to which one is instigated by cupidity and the love of gain rather than by a treasonable intent.

But although trading with the enemy be not specially prohibited, yet it is forbidden by the mere operation of the law of war. Declarations of war themselves sufficiently shew it; for they enjoin on every subject to attack the subjects of the other prince, seize on their goods, and do them all the harm in their power. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the interest of their subjects. A commercial nation is anxious to

trade, and accommodates the laws of war to the greater or lesser want that it may be in of the merchandizes of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandizes only, while others are prohibited, and sometimes it is prohibited altogether. But in whatever manner it may be permitted, whether generally or specially, it is always, in my opinion, so far a suspension of the laws of war. And in this manner, there is partly war and partly peace between the subjects of both princes.* The herring fishery was permitted on both sides by the edicts of the *French* and *Dutch* of the year 1536, and formerly by the edict of the latter of the 22d of *December* 1552. To which is to be added, what was done during the whole of the *Spanish*, *Portuguese* and *English* war, in the years 1653, 1665 and 1672, and also during the *French* war in the years 1672, 1689 and 1702, for it would be too long to commemorate every thing.

It is a question whether our friends are to be considered as enemies, when they live among the latter, say in a town which they occupy. *Petrinus Bellus*, *de Re Milit.* part 2. tit. 11. n. 5., thinks that they are not. *Zouch*, *de Jure Fœc.* part 2. § 8. Q. 4., gives no opinion. For my part I think that they must also be considered as enemies, certainly as to the goods which they have within the hostile territory, and therefore those goods may properly be taken by us by the law of war, if they have been before taken by our enemies. We may lawfully take all that belongs to the enemy, and those goods are a part of the enemy's dominion, which as they may be useful to them, may be hurtful to us. But if the goods of friends are within our territory, although their owners may be within that of the enemy, being detained there as prisoners by the law of war, I would then speak differently; because it is true that these are not the enemy's goods, nor can they be at all useful to him. Again, as we are to do to our enemies all the harm that we can,

* How is it, when, as in the present *European* war, the belligerents trade with each other, and prohibit neutrals from trading with their respective enemies? According to our author's opinion, it seems that such belligerents are so far at peace with one another, and at war with the neutral nations. T.

why shall we not take from them goods which they themselves have occupied by the law of war, and which they make use of as of their own? I know upon what principle others are of a different opinion.* They say that our friends, although they are among our enemies, yet are not hostilely inclined against us; for if they are there, it is not from their choice, and the *quo animo* only is to be considered. But the thing does not depend only on the *quo animo*; for, even among the subjects of our enemy, there are some, however few they may be, who are not hostilely inclined against us; but the matter depends upon the law, because those goods are with the enemy, and because they are of use to them for our destruction.

* Our author here distinguishes between the goods of a friend which are within our territory, while the friendly owner is a prisoner with the enemy, and those which having been captured by the enemy, as well as the person of the owner, are *retaken* by us. The latter, he contends, are, though the former are not, liable to confiscation.

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CHAPTER IV.

Of the Capture of movable property, and particularly of Ships.

WE have in the former chapters treated of the persons of enemies, we shall now speak of their goods and actions. It is evident that the enemy's property, whether movable or immovable, may be lawfully taken. To whose benefit the capture enures, whether to the private captors or to the state, I shall not now examine, as I am to consider this subject in the 20th chapter. But I shall at present attend to another question, which is not less important and which occurs every day, From what time is property changed by capture? I shall not distinguish here between the different species of personal property; whether a man be taken, or a ship, or merchandize, or furniture, or any thing else which may be properly the object of capture. By the *Roman law*, as *Grotius* very properly observes, the things taken are said to become the property of the captors, when they are carried *intra præsidia*,* for which doctrine there is no other reason, but that now every hope of pursuing and recovering the thing taken is at an end. "Whence," says the same author,† "it seems to follow, that ships and other things taken on the high seas, are considered as effectually captured, when they have been carried into a port or harbour, or in a place where the whole fleet is, for now their recovery begins to be despaired of. But," he adds, "by the modern law introduced among *European nations*, such things, in order to be considered as captured, must have been twenty-four hours in the power of the enemy." Which doctrine he applies in his notes to those things which

* Grot. De J. B. ac P. l. 3. c. 6. § 3. n. 1.

† Ibid. n. 2.

are taken upon land. *Zouch* has stated *Grotius's* doctrine very fairly,* and *Loccenius†* has done the same. What *Grotius* says of the doctrine of twenty-four hours, that it is now observed among all nations, without any distinction; whether a captured ship has been carried or not into a port of the captors, the attorney-general in the court of admiralty of *Amsterdam*, has formerly answered,‡ and others are of the same opinion.

But I never have been able to find that this custom was observed. I have found, indeed, that the military judges decided thus on the 24th of *December* 1624,§ and also at another time, but of what weight is the decision of men, mostly ignorant of law, who either have not been guided by any authority or perhaps have been seduced by that of *Grotius*. What I shall say in this and the next chapter will abundantly prove that this custom is repugnant to the laws and manners of the *United Provinces*. I know, that in the year 1631, the ambassador of the states-general in *England*,¶ requested the states-general to sanction by their authority that principle of jurisprudence, which vests the property in a prize after twenty-four hours' just possession; but I do not find that the states ever did so. It is indeed contrary to all reason; for if you consider the thing by the mere light of common law, the true reason of a change of property consists in a real possession. But a real possession is that which may be safely retained. Then what signify the twenty-four hours, if there may be a real possession within that time, and if on the contrary a possession may even continue longer and not be real? Certainly it has been impossible to lay down a general rule upon this subject, on account of the great variety of cases that may happen; but every case is to be considered by itself, and from every case it will result, that the property of the thing taken will not vest in the captor, unless he is able to keep and defend it. Things taken in war, says the digest, belong to him who has first taken possession of them. L. 1. § 1. *ff. de Acquir. vel Amitt. rer. Possess.*

* De Jure Fec. part 2. § 8. Q. 1 —† De Jure Marit. l. 2. c. 4. n. 4. —

‡ Consil. Belg. vol. 2. Cons. 66. —§ Consil. Holland. vol. 2. Cons. 151. —

¶ Aitz. l. 11.

And he is not considered as having the possession of a thing, who is not able to retain it. *L. 22. ff. Eod.* Such is the opinion of the most eminent jurists, which is dictated by the law of nations itself. When, however, we have such a possession that we may or may not retain the thing taken, the variety of cases is such, as I have said, that it is not possible to give any definition. We may, however, be considered as having a firm possession, when we have carried the thing taken *intra prasidia*, to use the language of the *Roman law*. By *prasidia*, we understand castles, ports, towns and fleets; for in any one of these the thing taken may be considered as safe, and in a situation to be defended.

But how can the twenty-four hours be sufficient, if it is not even sufficient, in order to change the property, that the captured thing should have been carried *intra prasidia*? For such is the mistaken idea of some, nay, of those whose authority otherwise is of the greatest weight. They are of opinion, that captured ships do not become the property of the captors, unless they have been carried into one of his ports and condemned there, and afterwards have freely navigated to a neutral port. Of merchandizes and other things, which are within the same reason, they might have said the same thing, but I believe they were ashamed. I well know what the states-general decreed concerning captured vessels on the 27th of *November 1666*: "That if ships, taken by the enemy and carried into *England*, and the kingdoms thereto belonging, and there condemned as prize, and purchased by neutrals, should be captured by *Dutch* ships on their way from the enemy's ports, either *in ipso actu* or afterwards, before arriving at their port of destination or at some other free port, such ships should then and therefore be declared good prize, as was usual in ancient times, and agreeably to the disposition of the fourth point of the *case stated** of the 26th of *June 1630*, *mutatis mutandis*." I have quoted the precise words of the decree, that I may not be thought to relate incredible things. You will wonder, indeed for my part I

* See the next page.

certainly do wonder, what it can signify, whether the ships have arrived or not into one of the ports of the purchaser, or into some other friendly port. This national or friendly port must then give, I know not how, I know not what, to I know not whom. It would not give a right of property to the enemy, who already had taken and sold the prize, nor to the purchaser, who had thus purchased our own property from one who was not the rightful owner thereof. Then that certain port of the neutral purchaser or of his friend would actually be the thing that would take the property of the vessel from us. If recourse was to be had to a fiction, it would have been better to suppose that the vessel became enemy's property by the enemy's capture, remained such until it was purged of that taint, and that it could not be so purged until it had entered the port of the neutral or of one of his friends, until which time it might be lawfully retaken. But such a fiction would not have been legal, because by the act of purchase the thing belongs to the purchaser, nor is it material whether it was originally his, or whether it became his property by capture and condemnation.

But observe how improperly ancient custom is appealed to, and see that other decree of the states-general of the 26th of June 1630, which is supposed to have given rise to that custom. That decree was made on a *case stated* by the admiralty of *Amsterdam*, which contained several questions, to the fourth of which the states answer thus:

"On the fourth point their high mightinesses declare, that ships taken by the enemy, carried into *Flanders*, and purchased by neutrals, but which shall be taken in the very act of coming out of the enemy's ports or on their way from them, before they have been into their own or in other free ports, shall be lawful prize, as has always been the custom in ancient times, by virtue of the right herein before alleged as to the *first point*; and likewise such vessels, which being so captured and purchased, and having run out of the said *Flemish* ports into other ports under the dominion of the king of *Spain*, and coming from thence, shall be captured by *Dutch* ships."

That this decree is very foreign to that cause appears from the case stated itself; and the states-general themselves, by referring to the *first head* of the decree,* sufficiently make known what was their reason for enacting it. The fact is, that for the sake of preventing commercial intercourse, the states-general had blocked up the ports of *Flanders* with ships of war, so that all vessels, to whomsoever belonging, bound to those ports, or sailing from them, were condemned by them as lawful prize; because by the law of nations and according to the principles of reason it is not lawful to carry any thing to a blockaded port, nor to take any thing away from it. Therefore the admiralty said; and the states-general decreed, that the same law applied to vessels which had been before taken from us and afterwards sold, because it was lawful to take even the ships of friends when trading with blockaded ports; which is true so far, that is, if they are taken before their voyage is ended, and while employed in the illicit trade, for the voyage is not considered as completed until the vessels have entered into their own or a friendly port.

This and nothing else was what the states-general had in view by the said decree of the 26th of *June* 1630, and on these principles, that of the 27th of *November* 1666 would have been very proper, if in that year the whole of *England*, *Scotland* and *Ireland*, and all the *British* dominions in *Asia*, *Africa* and *America* had been blockaded by the fleets of the states-general. It is indeed related, that in the year 1652 they boasted of a similar thing with regard to the *English*, having prohibited all trade with them to all the world.† But upon what foundation they so boasted I do not now inquire. I content myself with observing, that the same states-general in 1663 denied to the *Spaniards*, who pretended to blockade the whole of *Portugal*, that same right which they had before arrogated to themselves against the *English*. These facts are so recorded in *Aitzema's* chronicle.‡

* That is to say, the *first point* of the case stated, on which the states made their decree. What that *first point* was, does not precisely appear, though it may be gathered from the context of our author's observations on the whole decree.

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† Aitz. B. 32.—‡ Aitz. B. 43.

From thence it appears, that the said decree of the states-general of the 27th of *November* 1666 cannot be defended. And indeed if we once admit the principles of that decree, a number of monstrous consequences will necessarily follow: for as the poet says,

“ Si prava est regula prima,
“ Omnia mendose fieri atque obstipa necesse est.”

It will manifestly follow, that all enemy's goods, without exception, will be placed in precisely the same predicament; for whatever enemies have by capture is as much their own as what they have by succession, purchase, or by any other title. Therefore the same is to be said, not only, as I observed before, of merchandize and other things which enemies have taken from us, but also of ships, and every thing else which they have otherwise than by taking it from us, and which our friends have purchased from them. If this be admitted, we must also admit that it is lawful for princes to interdict their enemies from the use of fire and water, and to forbid all the world from carrying on a commercial intercourse with them, which hitherto has only been done so far as relates to those things which are called *contraband*: for all things of that kind which our friends may purchase of our enemies, may lawfully be taken and confiscated, unless they have been carried into a neutral port.

But it is unreasonable to infer a general rule from a law which, against the principles of reason, has been established in a particular case, by which means a pretence will be given to every sovereign to commit injustice. On this and no other ground was founded the edict of *Louis XIV.* king of *France*, of the 17th of *September* 1672, by which he ordered the capture and confiscation of all vessels, even purchased by his friends in the *United Provinces* and found coming from thence. In consequence of that edict, on the next day a certain vessel was condemned which had been taken coming from *Holland*, where she had been built and purchased by *Hamburghers*, manned with a *Hamburgh* crew, and was going to *Hamburgh*. To that edict of the king of *France*, the states-general, that they might not appear to do less harm to their

friends, (for such things fall upon the heads of friends) replied by an edict in which they decreed "that all ships purchased by neutrals within the dominions of the king of *France*, although manned with a neutral crew, which sailing for the first time from the enemy's ports, and not yet having been in the neutral port to which they were bound, should fall into the hands of *Dutch* cruisers, should be lawful prize." One would think that this edict was founded on the law of retaliation; but retaliation is only to be exercised on him who has committed the injury, and not against a common friend. Therefore the edict of the states-general of the 29th of *November* 1666 cannot be defended on the ground that the *English* had before acted with a greater degree of injustice when their ambassador, on the 23d of *December* 1664, gave notice to the *Hanse-Towns*, who were in amity then both with *England* and the states-general, that all the ships which they should purchase in the territory of the *United Provinces* should, without distinction of voyage, be considered as enemies.* He who has done no injury ought not in justice to suffer.

Moreover, from those decrees of the states-general of 1630 and 1666, one might think that it appears that those things which our friends have purchased from our enemies cannot be taken from them, if they have once been carried into a neutral port, as they say that such things may be lawfully condemned, "*before they have been into their own or some other neutral port:*" but so much does not even sufficiently appear. The admiralty of *Amsterdam* had consulted the states-general upon this subject, but nothing was decided upon it; for the states simply answered by their letter of the 26th of *June* 1630, "As to ships taken by the enemy from the inhabitants of this country, carried into *Flanders* and there condemned, which without being taken should be carried into *England*, *France*, or other neutral countries, and should be captured by our ships on their way from thence on other free

* Aitz. b. 44.

† E

voyages, we ought to have some short time to consider, whether or not they should be declared lawful prize, requesting that in the mean time you will communicate to us the sentences that have been given in similar cases, and the decisions that have taken place thereon in other countries."

On this same question I find that the court of *Holland* was consulted in the following year, 1631; but I do not know what answer they gave. But although the *Dutch* lawyers, requested to give their opinions on the same point, on the 25th of *January* 1636, answered very properly and upon true legal principles, "that our ships, taken by the enemy and purchased by neutrals, became by the very act of capture the property of the enemy, and therefore lawfully belonged to those who purchased from him," there have nevertheless been since that time disputes upon that subject.* But that this doubt of the states-general in the year 1630 may not hereafter occasion any prejudice, when similar cases shall arise, I must repeat what I have said above, that they had a special case before them, that the question was concerning the blockaded *Flemish* ports, which not being attended to, has involved the point in obscurity; but that from thence it would not be proper to argue as to ports which were not blockaded, and to and from which a free ingress and egress was permitted. The decree of the 27th of *November* 1666 is sufficiently iniquitous, let us not therefore add to it another injustice, which was not in fact such, because founded on a special case.

But if the states-general had meant to say, that the property of a prize is not altered, unless it has been carried into the enemy's port, and has afterwards freely sailed from thence and arrived into the port of a friend, what ground or reason would there be for their edicts, by which, in case of recapture of our vessels taken by the enemy, they allow a part to the recaptor and a part to the original owner? If mere capture transfers the property, what right remains to the former owner? if not, what right has the

* Aitz. b. 21.; Id. b. 23.

recaptor to a certain part, when the former owner may reclaim his property? I should think for my own part with many others, that no right remains in him, and so is the usage among all nations. These are things that can neither be reconciled with the decree of the 27th of *November* 1666, nor with law, nor with common sense.

CHAPTER V.

Of the Recapture of movable Property.

WHAT I have lightly touched upon at the end of the last chapter, I am now going to consider and discuss more at large. Whereupon it is to be observed, that immovable property, when recaptured, returns to the former owners by postliminy, but that movables which we now treat of do not so return. It is thus laid down by *Labeo*, in l. 28. *de Capt. & Postlim. Revers: Si quid bello captum est, in præda est, non postliminio redit.* "If any thing be taken in war, it is a prize, and does not return by postliminy." As to ships, however, although they are considered as movables, he distinguishes, l. 2. *pr. ff. eod.*, that such ships as may be of use in war return by postliminy, but others not. But this and other distinctions of the *Roman* law between movable things have become obsolete by the gradual change of manners, as *Grotius* justly observes.* Hence now movable goods, without any distinction, are prize, without any right of postliminy. As a consequence from this it has been inferred that goods taken by the enemy, and afterwards recaptured, vest in the recaptors; because, as capture, in time of war, transfers the property, so recapture must of course transfer it in like manner. But we do not recapture for ourselves, except those things which have *pleno jure* become enemy's property; for if they have not, the former owner may still vindicate his right. As to the time when movable goods are considered *pleno jure* as having become the enemy's property, it depends on the circumstances which I have treated of in the preceding chapter.

Although the definition of this thing is very uncertain, so much, however, is most true, that movable goods carried *intra præsidia*† of the enemy, become clearly and fully his

* *De Jure Belli ac Pac.* l. 3. c. 9. § 15.—† Within the places of safety. *T.*

property, and consequently, if retaken, vest entirely in the recaptors. The same is to be said of ships, carried into the enemy's ports, and afterwards recaptured, so that no property or right to them remains in the former owner, as I mentioned at the end of the preceding chapter. On these principles, the agreement which was made on the 22d of *October* 1689, between the king of *England* and the states-general, then allies in war, that each other's ships when recaptured should be restored to the former owner, on payment of a certain salvage, has been construed to apply only to cases where the ships had not been carried into the ports of the enemy, for otherwise they are to be entirely the property of the recaptors.

So far is sufficiently clear, but what is not equally so is what is to be understood by *præsidia*, or ports? Is it the ports of those who have taken the ship, or of their allies? It may be said that it is enough if they are carried into the ports of the latter, provided they are their allies in the existing war, and equally with themselves the enemies of those whose vessels have been taken. Prizes are equally safe in the ports of such an ally, as in those of the captor himself, and there is no hope of retaking them, unless they should sail again out of that port. But when the *French* had taken two *Hamburg* ships, on the 28th of *December* 1675, in which were the goods of *Amsterdam* merchants, and had had them fourteen days in their possession, and afterwards carried them into the port of *Hull* in *England*,* I find that the states-general entertained a different opinion. The admiralty of *Dunkirk*, before the return of the *French*, had condemned the said ships and their cargoes, and the *French* had even sold a part of the goods at *Hull*; and as the ships, with the remainder of the goods, were on their way to *Dunkirk*, they were taken by the *Zealanders*, carried into *Zealand*, and there condemned. But the states-general, being applied to by the *Amsterdam* merchants, did, on the 23d of *October* 1676, decree, that the recaptured goods should be restored to their former owners, because they had not yet been carried into the ports of the enemy and there con-

* *England* was at that time in alliance with *France* against the *United Netherlands*.
T.

demned and distributed. By the ports of the enemy, the states-general understood those of the captors, for they say "*of the aforesaid enemy*," thereby implying that it was not sufficient that the ships had been carried into another port, either of a *friend* or of an ally in the war. It appears to me that the *Zealanders* had the *law*, and the *states-general* had *power* on their side.*

Ships therefore become the property of the enemy, which have been taken by them, and carried into their ports. But what if they have not been yet carried thither, and should have remained some time in the port of a friend or ally, or navigated in company with the capturing ship? Certainly, if we consider the laws of our country, and the authority of publicists, it can hardly be said, that the length of time that ships have been captured, or the place into which they have been carried, though ever so safe, can transfer the property, unless they have been carried into port. Hence jurists simply say, that every thing which is retaken before it is carried into the enemy's ports, is entitled to *postliminy*, although it may have been taken for several months, and although it may have remained in the ports of a common friend, and that it does not vest in the enemy, unless he has carried it into his

* From this, and what our author says afterwards, page 41, it seems that he was of opinion that a belligerent might lawfully condemn enemy's property, while lying under capture in a *neutral port*. Such appears also to have been the opinion of that able civilian sir *William Scott*, (while *advocate-general*) and of the whole court of *king's bench* in *England*, in 1789. (*Smart v. Wolff*, 3 *Term Rep.* 329.) But political considerations have since induced that learned judge to maintain the opposite doctrine, contrary to the ancient, nay, inveterate practice of his own country, which probably, however, continues the same, the superior court not having appeared disposed to controvert the established principle and to adopt the new rule which was pointed out to them. (*The Herstelder*, 1 *Robinson's Reports*, 100.; *the Hendrick and Maria*, 5 *Rob.* 35. 6 *Rob.* 138. *Amer. edit.*) The supreme court of the *United States* have sanctioned what appears to be the opinion of our author on this point, by their decisions in the cases of *Rose v. Himely* and *Hudson v. Guescier*, 4 *Cranch's Reports*, 241. 293. These decisions are conformable to the universal practice of *Europe* for more than one hundred years, which is, indeed, sufficiently justifiable, on principles of convenience to neutrals as well as to belligerents. See *Lampredi, del commercio de' popoli neutrali in tempo di guerra*, part 1. § 14.

own ports. The word *postliminy* is very *improperly* used here, because those who know what *postliminy* is, know also, that it does not take place except in regard to those things which had before become the property of the enemy. They should have said, that before prizes were carried into port, they did not become the property of the enemy, but remained the property of the former owner, and that therefore when recaptured they returned to him, and did not go to the recaptor.

It will not be unprofitable to consider what laws have been made on this subject in this country, taking them in their chronological order. There are some who think from the edict of the states of *Holland*, of the 4th of *March* 1600, that there existed a right in favour of former owners to claim their captured property, wherever they might find it, even though it had been carried into the enemy's ports. This is correct as far as the edict goes, but it speaks only of those vessels, which the states of *Holland* considered as having been condemned in violation of the laws of war, as I have said before; (c. 2.) therefore the edict does not apply to the present question. If the ships have been lawfully taken, carried into port and condemned, every claim must cease; and if they sail afterwards, there remains nothing but a right to recapture, and whoever retakes them will be their full and complete owner. But it is important to know, before the carrying of the ship into port and her subsequent condemnation, what right belongs to the former owner, and what to the recaptor? If we know what belongs to the one, we know at the same time that the remainder belongs to the other.

The oldest law that I know of on this subject, is the edict of the states-general of the 4th of *July* 1625, by which it is enacted, that if a vessel be retaken within twenty-four hours, one eighth goes to the private recaptors; if within forty-eight hours, one fifth; if afterwards, one third. This law the same states-general on the 22d of *July* 1625, applied to ships of war, recapturing private vessels. There followed afterwards another law also enacted by the states-general, of the 11th of *March* 1632, by which, without any distinction of time, private recaptors were entitled to two

thirds of their recapture. But afterwards, on the 1st of *September* 1643, the states-general altered this disposition, for by the fifty-eighth section of their edict of that date, if a ship be recovered within twenty-four hours, the recaptor is to have one eighth; if within forty-eight hours, one fifth, and if afterwards, one third, as in former edicts, which, I think, were made on the 4th and 22d of *July* 1625. Afterwards they returned to two thirds, without any distinction of time with regard to privateers, agreeably to the edict of the year 1632. The 16th section of the edict of the states-general of the 8th of *February* 1645, gave two thirds to the recaptors, and added that the value of the vessel and cargo should be amicably estimated between the owner and the recaptor, otherwise that the admiralty should decree on the amount of salvage. They again changed their minds on the 19th of *April* 1659, for by a decree of that date, they gave to the recaptors, whether of public or private ships, but one ninth part of the vessel and cargo retaken, thus again abolishing every distinction of time. This decree, however, was never published, but I have found it among the acts of the states-general, and it is mentioned somewhere else. At last, the states-general, saving, as they say, the ancient laws as to ships of war (what ancient laws they meant I cannot say, as they have so varied) did on the 13th of *April* 1677, decree as to private recaptors as follows, to wit: that they should have by way of salvage, one fifth of the ship and goods retaken, if the same had not yet been forty-eight hours in the possession of the enemy; if forty-eight hours and less than ninety-six hours, then one third; if more than ninety-six hours, one half.

The king of *England* and the states-general were pleased to establish between them the same distinction and division of time, and the same rates of salvage, by the treaty above mentioned of the 22d of *October* 1689, in case a privateer of one nation should retake the ships or goods of a subject of the other party, but if the recapture should be made by a ship of war, the recaptor was to have only one eighth, without any distinction of time.

Now, why so much variety? why these distinctions of time and those greater and lesser shares in proportion thereof? Whence again, if the distinction of time must be had, so much diversity in the proportion of the salvage? Why also, rejecting all distinction of time, is now so large a proportion as two thirds and now so small a one as one ninth allowed to the recaptor? Certainly it is difficult to give a reason for things that have been established without any reason, and here, if any where, it will be proper to refer to the law *non omnium**—the reader knows the rest. The public tranquillity of nations however, and the repose of our own subjects, require that something certain should be established upon rational principles. The whole depends upon this question: when do we consider that captured ships and goods vest absolutely in the enemy? The law indeed has decided that they so vest by a true and complete occupation. But the variety of cases and circumstances does not always permit us to know, whether there is actually a firm possession, that is to say, such a one as the captor may retain and defend. What the enemy has taken on the high seas, at a great distance from his territory, he may lose, and often loses by recapture. If he carries what he has taken into his own ports and territory, no one can doubt that it has then become his absolute property. *I would say the same* if he had carried it into the port of a neutral or of an ally, but *if this*, as I said above, *cannot be admitted*,† *I must* grant, that whatever is taken at sea, is to be carried into the captor's own port or fleet, and that it cannot be until then considered as fully his.

What then, if it be recaptured before that time? Then the former owner will have a right to claim his property, as the property has neither vested in the captor nor in the recaptor; I say the *former* owner, because there has been an intermediate possession of some kind. But shall the owner claim his property from the recaptor, without paying him any salvage or reward for the recapture? without any remuneration for his

* *Non omnium, quæ à majoribus constituta sunt, ratio reddi potest.* A reason cannot be given for every law which our ancestors have established. *Dig. l. 1. tit. 3. l. 20.*
T.

† See note, p. 38.

labour and expense in and about the said recapture? this, equity, the supreme law of nations, will not permit. It requires that a salvage, premium, reward, something, in short, by whatsoever name it may be called, should be given. The recaptor has saved the ship and goods, which otherwise would have been lost to the owner, and why should he have exposed himself to danger without any hope of reward? why should he have fought for the property of another as if it were his own? why should he have employed his arms and his men to no purpose whatever? He has beneficially managed the business of the owner, and he is entitled for his labour and expenses to the action *negotiorum gestorum*.* I do not know of any other action in the *Roman* law proper for the recaptor; if the thing is to be decided by the rules of the *Roman* jurisprudence, for this action is the only proper one when a reward is sued for, either for work and labour done or for money laid out. But upon what law or principle it has been thought proper to give to the recaptor a part of the thing retaken, I do not myself understand; much less do I understand how that proportion can be greater or less according to the quantity of time that the thing taken has been in the hands of the enemy. What have 24, 48 or 96 hours to do here? The greater or lesser duration of the enemy's possession, when the thing taken has not been carried into a place of safety, cannot, in my opinion, give a greater or a less right.†

Wherefore, if the subject is to be considered according to the rules of reason, every distinction of time is to be abolished, and in lieu thereof is to be the proportioned value of the recaptor's labour and expenses, taking into consideration the danger that he has been exposed to, and the value of the things saved. From all these considerations taken together, impartial men are to settle and determine what reward he is entitled to. Nor should the allowance be dealt with a sparing, but

* This action in the civil law is analogous to our *general assumpsit* founded on an implied contract, for work and labour done and money laid out and expended. T.

† See the case of the *Santa Cruz*, 1 Rob. 44. *Philad. edit.* in note. T.

with a liberal hand, in order to encourage the industry of recaptors. For, is it to be of no consequence whether the recapture has been made with great or little trouble or labour? whether the recaptor has fought bravely? whether he has expended a great deal? whether the things saved are of great or of little value? If it should be observed that the valuation of such things is so uncertain that it might occasion a great deal of litigation, I answer, that as the matter stands, there will not be less controversy, and that there have often been great contestations about the value of a ship and goods, and what ought to be deducted from it,* before the true value thereof has been determined.

But afterwards, if you still chuse to give a part of the thing saved, give it; not, indeed, in proportion to the time that the prize has been in the possession of the enemy, but to the labour employed upon it, as is usual in other cases of salvage. Thus the *Rhodian* law has allowed a reward to those who have saved property from shipwreck, varying according to the degree of labour, as is said by *Harmenopulus*, Περ. l. 2. tit. 11. § 18. agreeably to which I interpret the *reasonable salvage* which *Mary of Burgundy* allowed to the salvors of shipwrecked property, by her law made for *Holland* and *Zealand*, on the 14th of *November* 1476. A proportion of the thing saved from shipwreck was also allowed by the edict which *Philip II.* on the 15th of *May* 1574 issued in the name of *William of Orange*, which has been often reenacted, and lately, on the 2d of *April* 1676; but the salvor is allowed there a greater proportion than is therein expressed, if he has been at a greater labour and expense. I conceive that the states of *Holland* had a view to this, when on the 22d of *July* 1677, they decreed a *reasonable salvage* to those who should take up timbers floating down the rivers without any guard, and deliver them up to the company of ship-builders at *Dordrecht*. Those laws do not distinguish, how long the things shipwrecked, and the timbers found drifting may have been

* In the *United States*, salvage is generally allowed on the *gross* value of the property saved. T.

floating at the mercy of the sea, rivers and wind, as there is no reason for that distinction, but left it to the arbitration of impartial men, to determine the amount of the reward for the labour and expenses. Nor do I think that any other rule should be followed, with respect to ships and goods retaken from the enemy.

Indeed, in the book called *Il Consolato del Mare*, the point is determined exactly as I have said; for there the recaptor is ordered to restore the vessel and cargo to the former owner, saving however, a salvage, which, in order to be just, is to be liquidated in proportion to the labour and expense employed in and about the recapture,* without making any distinction about the time that the vessel and cargo have been in the possession of the enemy. It is very properly added in the same book, that this restitution only takes place when the ship has not yet been carried into a place of safety, but that if it has been so carried, the property having thus clearly vested in the enemy, if the ship and goods are afterwards retaken, they belong entirely to the recaptor.† Which agrees perfectly with the doctrine that I have contended for in this chapter. I wish that all the principles which are contained in that *farrago* of nautical laws were equally correct; but every thing that is there is not so sound.

* *Dando a quelli che a i detti nimici tolta haveranno, BEVERAGGIO conveniente, secondo la fatica che ne haveranno havuta, e secondo il danno che ne haveranno sofferto.* Giving to the recaptors a sufficient beverage or drink-money, in proportion to their labour and damage suffered. *Il Consol. c. 287.* In the late French translation by *M. Boucher*, it is c. 290. § 1136. T.

† *Anzi debba essere tutta di loro.* *Il Consol. Ibid.—Fr. Transl. Ibid. § 1138. T.*

CHAPTER VI.

Of the Possession of Immovables taken in War.

WE must now consider, for the subject is worthy of it, how far extends the possession of immovables acquired in war, and the property arising out of such possession. *Grotius** simply says, that every kind of possession is not sufficient, but that it must be a *firm possession*, which he explains thus: "as if a country is so provided with permanent fortifications, that the adverse party cannot enter it openly without first making himself master of them by force." What then if the fortified town is taken; shall the country be considered as taken also, and for how long? *Grotius* decides absolutely nothing about this, and yet he often proposes this question when he speaks of the capture and occupation of places. An example will make the thing more clear. The *French* had taken *Casal* and *Turin* in *Piedmont*; a truce was afterwards made, during which it was agreed that each party should keep what he had taken on the principle of *uti possidetis*. A question was made about the territory and villages which owed services and duties to the cities which were held by the *French*.

There were lawyers who decided that question against the *French*, on the ground that the law of nations requires actual possession, acquired by natural means, and that the part occupied does not draw along with it the part not occupied. Therefore they were of opinion that the obligation of those inhabitants did not enure to the use of the *French*, as the citizens themselves submitted to their dominion against their will. It is thus contended by *Petrinus Bellus*,† with whom I do not know whether *Zouch* agrees.‡ But I think *Bellus* was mistaken: he was certainly so in the case of

* De Jure B. ac P. l. 3. c. 6. § 4.—† De re militari, part 5. t. 3. n. 7.—

‡ De Jure Fec. part 2. § 9. Q. 48.

a truce like the present, because the general words *uti possidetis* embrace an implied as well as an actual possession. That implied possession consisted in the performing and receiving services and duties, which were usually rendered only to the master; but what actual possession is will be seen from what I am about to say.

Reason, therefore, is to point out to us, what may be properly called a possession of immovables, taken in war, which is that the whole is occupied and possessed, if such has been the intention of the captor; and thus *Paul* defines it in l. 3. § 1. *ff. de Acquir. vel amitt. rer. poss.* That this is not a principle merely of civil law, but also of natural law, the thing itself, and custom which is an excellent teacher, abundantly demonstrate. Possession extends to every thing that is occupied, and what is occupied is placed within our power by the law of nature; but even that is considered as occupied, which is not touched on all sides with our hands or feet, if the occupant so chuses, or the nature of the case requires it, as is the case with lands. On another principle it would not be easy to say what is possessed or occupied, for if every thing is to be touched, it is not even sufficient to touch the surface of the land; it will be not only necessary to walk round, but to dig into every field.

But although it be true, that a part being taken, the whole is taken, when the taking is made with that view or intent, yet it will not otherwise obtain, than if no other person possesses another part of the thing in question. For if another possesses a part of the same whole, he would by the same reason possess the whole. This cannot be said with propriety, for as *Paulus* very truly says in *D. l. 3. § 5.* two persons cannot at the same time possess the whole of the same thing, because the ownership of one would exclude the ownership of the other. If then one is in possession of a thing, and another takes a part of it which the other does not corporally occupy, he has taken nothing but what he has occupied by natural means, nor can the thing be possessed *pro ratâ*, in proportion to the parts which each actually occupies, because the possession of the first occupant is paramount, and

cannot be excluded by another, which is only similar, each of them having the same force and effect as the other. And the latter occupant has done away what is called the *legal possession* of the other in that part which he detains, for no other reason than because he possesses it by natural means; for the natural possession has taken away the *legal* one. It is the same thing that *Celsus* says in l. 18. § 4. *ff. Eod.* "*Si cum magna vi ingressus est exercitus, eam tantum modo partem quam intraverit obtinet.*" If an army has entered a territory with great force, it has possession only of that part of the country which it has entered upon." When he says, *with great force*, he means that there was a resistance made, and that there were those who defended by force the possession of the first owners. An army, therefore, does not further occupy a country than it has compelled the opposite army to recede. Perhaps *Paulus* is to be thus understood, in *D. l. 3. § 1.* when he says that a part being taken with intent to take the whole, the whole is occupied, but to a certain extent only, *usque ad terminum*; which I take to mean, so far as to that part which another possesses, whether it be a neighbour on an adjoining land, or some other person on the very land which is contended for.

Hence it is not difficult to discern what may be considered as properly occupied in an occupied country. The metropolitan law of itself has nothing to do with this case, for it is a municipal law which the sovereign may establish wherever he pleases. If so, it is easily understood that if from the occupation of a strong place, dominion is exercised over the whole country, yet by that occupation, the victor is not considered in possession of those cities, walled towns and fortresses which the sovereign still detains, but all these things are to be judged of by the fact itself of occupation and possession.

According to this principle we say, that if a part of a country be occupied, the whole is considered as occupied, if the vanquished party has retained no other part of it; but if he has, then nothing is occupied, but what the victor has taken by force from the vanquished, and is actually in possession of. But in regard to several distinct countries under the dominion of the

same prince, it may be asked, whether the same distinction can apply, which is used with regard to contiguous private estates? If *Titius* is the owner of three contiguous plantations, *A*, *B* and *C*, and *Gaius* occupies part of the plantation *A*, he will be considered as occupying the whole of it, but not the plantations *B* and *C*. For when we possess an estate, our possession goes as far as its extent, or its boundaries, but no farther; *fundo enim possesso, ad terminum quidem, sed ad terminum duntaxat, neque ultra possidemus. D. l. 3. § 1. ff. de Acquir. vel amitt. rer. poss.* He who has entered on part of the plantation *A*, is not supposed to have entered upon it with any other intent than to possess himself of the whole of that of which he has occupied a part, but he is not considered as having thought in the least of the manor *B* or the manor *C*. When we occupy a part of a whole which is distinguished from all other things, that distinction marks the boundaries of our possession, whether it be a house, a piece of land, a store or warehouse, or any other thing which comes under the denomination of *immovable property*.

But in my opinion there is another principle as to immovables which are occupied by right of conquest.

The intention of the conqueror is not merely to invade one district, but the whole of the hostile empire, and to make his own all the countries belonging to it. Nor is there here any boundary, but that part of the country which the vanquished still retains. If there is nothing that the conqueror cannot possess, if he pleases, what hinders him from proceeding on and actually possessing the whole? If no one district is retained by the vanquished, the occupation of a single one by the conqueror, nay, of the metropolis alone, will give him possession of the whole empire. Here we must acknowledge the truth of what the ambassador of the emperor *Justinian* said to *Chosroes*, king of *Persia*, according to *Menander Protector, Hist. Byzant.* tom. 1. p. 143. 'Ο γάρ διπλόνας Ἡγεμονεύει, καὶ ἐν ἑξὺ τὸ ἐπικρατεῖ; Shall not he, who is the master of him who commands, also be the master of what is subject to him? But if the conquered party still retains something, it will not be considered as a conquest of the whole of his dominions

that his metropolis has been taken and is occupied by force of arms.

Those princes therefore have justly been laughed at, who because they had taken *Rome* or *Constantinople* arrogated to themselves the whole *Roman* empire, while other princes occupied several large parts of it. Of this kind was the arrogance of *Belisarius*, as related to us by *Procopius*, *de Bello Vandal.* l. 2. c. 4.; for he, after *Justinian* had taken *Carthage* and her king *Gelimer*, boasted publicly, that every thing belonged to him which *Gelimer* possessed in *Sicily*. Here he was altogether wrong, for the right which he had over *Carthage* and the person of her king, could not transfer to him the possession of what was in *Sicily*. *Sicily* defended itself by its own force, and by taking the king, the whole of his dominions was not taken. Actual occupation is necessary, or a cession, if it be so agreed by the treaty of peace.

Let us now see what the states-general have decreed upon this subject. When by the 3d section of the truce between the archduke of *Austria* and the states-general of the 9th of *April* 1609, it was agreed that each should continue to possess what he was in possession of at the time of the truce, and the archduke had posted up his edicts in the territory of *Kuyck*, which he occupied, the states-general on the 20th of *August* 1609 decreed, that that territory belonged to them, because they possessed the town of *Grave*, to which it was subject, and prohibited all others from exercising jurisdiction therein. When also the states-general had taken some fortresses in the *Overmaze*, and the *Spaniards* had nevertheless prohibited the inhabitants from submitting themselves to the jurisdiction of the council of *Brabant*, sitting at the *Hague*, the states, by way of retort, opposed that interdiction by their edict of the 8th of *March* 1634. Again, when *Boisleduc* belonged to the states-general, and the *Spaniards* made great disturbances respecting the territory thereof, the states obviated them by various edicts, viz. of the 20th of *January* and 3d of *August* 1630, 13th of *May* 1631, 20th of *June* 1634, 2d of *February* and 2d of *December* 1636, and again on the 24th of *December* 1642, in which edicts, of the

8th of *March* 1634, and 2d of *February* 1636, is also recited the edict of the king of *Spain* of the 10th of *July* 1628, in which that sovereign asserts, at great length, that the territory subject to a town follows the conquest of the town itself. The states availed themselves of the same principle, and very properly too, because those are considered as being in possession of a territory, who command there at their pleasure. But if there is in that territory a fortress not yet occupied, so far as that fortress commands the territory, the possession and dominion of the occupier of the remaining part of the country does not take place.

If the principles which I have contended for are correct, as indeed they appear to me, the council of *Brabant*, which legislates at the *Hague* for those parts of *Brabant* which the states have taken by the right of war, has justly enacted by its edict of the 26th of *October* 1629, that the investiture of the fiefs situate in the territory of *Boisleduc*, was to be asked of them, and not of the council of *Brabant*, sitting at *Brussels*. And it also appears, that the king of *Spain* had no right to issue, as he did, a contrary edict on the 15th of *November* 1629, as *Aitzema* relates in detail.* For, by the capture of *Boisleduc*, the whole adjacent territory belonged to the states-general, and therefore they were the lords of the fiefs situated there; as the conquered vassal owes fealty and services to the conqueror, not to the conquered prince.

There is still less doubt, that if a province be ceded, all its parts are ceded likewise. On this subject there is extant an edict of the states-general, of the 22d of *December* 1610, concerning *Twent*, a district of the province of *Over Yssel*.

* Aitz. b. 9.

CHAPTER VII.

Of the Confiscation of the Enemy's Actions and Credits.

IF there are treaties between princes about taking away their goods within a certain time in case war shall take place, several of which treaties I have above mentioned, c. 2.; it is true that they may remove their goods and effects as well as their actions and credits. But if there are no such treaties, or if the goods and actions are not taken away within a limited time, it is asked, what is the law in that case? And surely, such being the state of war, that enemies are on every legal principle proscribed and despoiled of every thing, it stands to reason that every thing belonging to the enemy, which is found in the hostile country, changes its owner and belongs to the *fisk*.^{*} It is besides customary in almost every declaration of war to proclaim that the goods of enemies, as well those found among us, as those taken in war, shall be confiscated.

There are also now extant on this subject separate acts of state, whether preceded or not by a declaration of war. The prince of *Orange*, on the 25th of *August* 1572, inserted in the form of government which he then made for *Holland*, "that the goods of all those who acted publicly as his enemies, should be immediately registered by the magistrate of the place where they were found, and their rents and profits should be taken for the benefit of the commonwealth." I understand this to apply to real estates, which it is usual to register, that the rents and profits in time of war may go to the public. If we follow the strict law of war, even immovables may be sold, and their proceeds be lodged in the public treasury, as is done with movables; but throughout almost all *Europe*, immovables are only registered, that the treasury may receive during the war their rents and profits.

^{*} As we make use of the words *fiscal*, *confiscate*, *confiscation*, why should we not adopt in *America* the word *fisk*, from the Latin *fiscus*, which is the root of all those derivatives?

At the termination of the war, the immovables themselves are by treaty restored to their former owners.

On the 2d of *April* 1599, the states-general again issued an edict with regard to all kinds of enemy's property, wherever found, which is in these words: "We declare lawful prize all persons and goods situate or being under the jurisdiction of the king of *Spain*, wherever the same may be taken." There exists also a letter from the states-general to the court of *Holland* dated the 25th of *November* 1672, by which they are simply ordered to detain and confiscate the goods of those who *reside* among the enemies, on which there issued an edict of the court of *Holland* of the same day, declaring that the goods could not be restored to their owners after the date thereof. I am not now inquiring whether this be agreeable to the treaty made in the year 1662, between the states-general and *France*. But as estates of inheritance are principally to be included under the denomination of goods, (*bona*)* it is clear that an enemy cannot acquire such an estate situate in our country, even though it came to him by succession or by will. Agreeably to this principle, when in the year 1695, a person died intestate in *Holland*, whose next of kin and heirs at law were in *France*, I remember that the inheritance was confiscated.

As the edicts which I have recited speak in general terms, they are to be taken to apply to all kinds of goods, whether corporeal or incorporeal. Of incorporeal goods, however, such as actions and credits, I see that doubts exist, and that the states-general themselves have doubted,† nay, and have some-

* At the civil law the word *bona* includes every kind of property, real, personal and mixed, but chiefly, as our author says, applies to *real* estates, *chattels* being generally distinguished by the words *effects*, *movables*, &c. The *English* civilians translate the word *bona* by *goods*, which we employ here in the same sense, though very different from that of the common law. T.

† Not only doubts have been entertained on this subject, in the *United States* and *Great Britain*, but the two governments by the treaty which was made between them in 1794 have expressly recognised the opposite principle. By the tenth article of that treaty, it is stipulated "that neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys which they may have in the public funds or in the public

times acted in contradiction to the principle. When the king of *France* and the bishops of *Cologne* and *Munster*, in the year 1673, confiscated even *actions*,* and gave orders to call in what their subjects owed to the citizens of the *United Provinces*, the states-general, by their edict of the 6th of *July* 1673, reprobated it, and decreed that payment could not be made but to the true creditor, and that they would not ratify such an exaction, whether made by force or by consent. But in fact it appears that by the common law† *actions* may be confiscated, for the same reason that corporeal goods may. *Actions* and credits are by the law of nations not less under our dominion than other goods; why, therefore, might we pursue these and not those by the law of war? and if there is no ground here for a rational distinction, reason alone supports the principle of the common law. But examples and authorities are not wanting in support of it.

It appears from *Polybius*, *Excerpt. Legat.* c. 35. n. 4., that it was agreed between the *Romans* and *Antiochus*, that *actions*, as well as every thing else which had been confiscated during the war, should be restored. Therefore it follows, that *actions* had been confiscated on both sides. That the kings of *France* and *Spain* also exercised this right towards each other, appears by the twenty-second article of the treaty of peace made between them, on the 17th of *September* 1678, for by that article it is stipulated that credits which have been actually confiscated shall not be restored. And the king of *Denmark*, having declared war against the *Swedes*, did on the 9th of *March* 1676 issue an edict ordering that the goods of *Swedes* within the *Da-*

or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being *unjust and impolitic* that debts and engagements contracted and made by individuals, having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.”

T.

* Here we again use the technical language of the civil law. The common law term is *things*, or *chores in action*.

T.

† The civil law and the law of nations are very frequently styled “the common law” (*jus commune*) by writers on the continent of *Europe*. They are, in fact, in many respects, the *common law* of the civilized world. T.

nish empire, and all the debts due to *Swedes*, should be brought within six weeks into the public treasury, there to be confiscated, under a penalty of double the value and discretionary punishment against those who should not obey. The king of *Denmark* had decreed something similar against the *English* in 1667, as is related by *Aitzema*.*

Nor does it appear that the *Dutch* have always been averse to that doctrine from the edict of the 18th of *July* 1536, from that of *Philip II.* against the *French* of the 27th of *March* 1556, and that of the states of *Holland* of the 29th of *January* 1591. There is also an edict which the prince of *Orange* and the court of *Holland* issued on the 7th of *December* 1577, under the assumed name of *Philip II.* king of *Spain*, by which they ordered the confiscation of all the movable and immovable property, and of all the actions and credits, not only of those who had gone over to *Don John* of *Austria*, but of all their enemies. The states-general also, on the 4th of *June* 1584, declared those of *Bruges* and *Vrye*, who had gone over to the *Spaniards*, to be their enemies, and ordered all their goods, actions and credits, public as well as private, to be confiscated. And afterwards, when those of *Venloo* had also gone over to the *Spaniards*, the earl of *Leicester*, by his edict of the 9th of *July* 1586, declared them guilty of the crime of high treason, and ordered all their goods, movable and immovable, and all their actions and credits, to be confiscated. Nor must it be believed that these things were decreed concerning those of *Bruges*, *Vrye*, and *Venloo*, merely because they were not so much enemies as they were traitors, as they had previously bound themselves by the confederation of *Utrecht*; for I must observe, that the penalties of the edict of the 4th of *June* 1584 are expressly applied to all who hold themselves to be our adversaries, in whatever manner it may be, precisely as in the abovementioned edict of the 7th of *December* 1577, traitors and enemies are classed together, as to that particular purpose.

Under this head are also to be noted the decrees of the states-general of the 2d, and of the states of *Holland* of the 29th of

* Aitz. b. 47.

October 1590, in both of which the following sentence is contained: "That those who come into these provinces out of the enemy's territory, although provided with proper passports, shall not be qualified to bring any personal or real action, either in the petitory or in the possessory, but shall be dismissed from court, in order that hostility against the enemies, and the confiscation of their goods, rights and actions, may subsist in their fullest extent." By these decrees they are not permitted to bring even personal actions, and the reason publicly given for it clearly shews that they cannot do it, because not only the goods of enemies but their actions are liable to confiscation. And when once the king of *France* had ordered the goods of *Dutch* subjects to be seized, the states of *Holland*, on the 26th of *April 1657*, ordered the same thing with regard to the goods of *French* subjects, and prohibited any body from paying to them, on pain of being compelled to pay the amount a second time, for the indemnity of the *Dutch* subjects who had suffered by the seizure of their goods in *France*, and of paying moreover half the amount of the debt by way of punishment, and they ordered the goods and credits of *Frenchmen* to be brought under a penalty to certain officers appointed in each town for that purpose. Wherefore, if the subject of a prince who has confiscated the credits of his enemies, should pay to his government what he owed to the enemy, it has been very properly held that he is discharged.

These things, however, do not take place when war is carried on with so much mildness that commerce is permitted on both sides: for there cannot be any commerce without contracts, contracts without actions, actions without courts of justice, nor courts of justice without parties to litigate before them. Who will sell and carry goods to an enemy without the hope of recovering the price of them? and what hope can there be of recovering that price, if one cannot judicially compel payment from his enemy purchaser? Although, therefore, an enemy has no *persona standi in judicio*,* as it is

* No right to be heard as plaintiff in courts of justice. T.

simply expressed in the decrees of the 2d and 29th of *October* 1590, and although it has been thus held and adjudged in this country in various instances, yet the case of commerce is properly excepted, that is to say, when there is a mutual liberty of trade; for if there is not, actions, though arising out of commerce, may justly be confiscated. But is the case of commerce to be so distinguished from all other cases, that in this we grant, and in others we refuse to the enemy the *persona standi in judicio*? It has undoubtedly been so adjudged, and if the distinction is proper here, it must also obtain as to the confiscation of actions. But if the enemy be once permitted to bring actions, it is difficult to distinguish from what causes they arise, nor have I been able to observe, that this distinction has ever been carried into practice.

Moreover, if you do not permit your enemy to bring actions, neither can you with justice suffer them to be brought against your enemy, if perchance he should tarry within your territory, and thus the decree of our supreme senate, of the 18th of *September* 1590, confirming the sentence of the inferior judge and of the court of *Holland* is unjust, to wit, that an enemy, who had come with a safe conduct into this country, might be arrested and held to bail in a civil action. For it is manifestly unjust to hinder an enemy from bringing actions, (as he is plainly forbidden by the said decrees of the 2d and 29th of *October* 1590,) and not to allow him the same privilege. Whatever right one arrogates to himself by the law of war, he must also allow to his enemy.

What I have said about the legality of confiscating actions, obtains only in case the prince has really made his subjects pay what they owed to the subjects of his enemies. If he has exacted it, they have lawfully paid, if not, when the peace takes place, the former right of the creditor revives, because the occupation which is had by war consists more in fact than in law. Therefore credits not exacted are in some manner suspended during the war, but at the peace they return to their former owners by a kind of postliminy. Upon this principle it has been agreed among almost all nations, that actions which have been confiscated during the war, and have been

called in by the sovereign, are considered at the peace as lost, and are for ever extinct; but if they have not been exacted they revive and return to the real creditors. It was thus agreed by the fifth article of the treaty of peace between *Frederick III.* king of *Denmark* and *Charles II.* king of *England*, of the 31st of *July* 1667, the thirty-seventh article of the treaty of peace between the kings of *Spain* and *England*, of the 21st of *September* 1667, and the twenty-second article of the treaty of peace between the kings of *France* and *Spain* of the 17th of *September* 1678, which twenty-second article I have mentioned above in this chapter, in order to establish what is proved by the said 5th and 37th articles, that actions have not less than other goods of the enemy been confiscated in time of war, and have often been exacted.*

Let it not, however, be supposed, that it is only true of actions that they are not condemned *ipso jure*; for other things also, belonging to the enemy, may be concealed and escape condemnation. So that it has been very properly held that those things which we had in the enemy's country before the war began, and which during the war have been concealed, and therefore not condemned, if they are afterwards retaken by our countrymen, do not become the property of the recaptors, but return to the former owners.

* *Vattel*, though he acknowledges the legality of confiscating in war the enemy's actions and credits, yet tells us that a more liberal practice has generally prevailed in modern times. "*Mais aujourd'hui, l'avantage et la sûreté du commerce ont engagé tous les souverains de l'Europe à se relâcher de cette rigueur.*" But at this day, the advantage and security of commerce have induced all the sovereigns of Europe to relax from this severity." *Vatt. Law of Nat. b. 3. c. 5. § 77.* T

CHAPTER VIII.

Of Hostilities in a neutral Port or Territory.

WE only exercise the rights of war in our own territory, in the enemy's, or in a territory which belongs to no one. If we take the enemy in our own territory, and he has come to it without a safe conduct, there is nothing that prohibits our treating him in a hostile manner. To enter the territory of an enemy, and there to make captures, is permitted by the law of war. The same may lawfully be done on the high seas, as being the territory of no one. But he who commits hostilities on the territory of a friend to both parties, makes war upon the sovereign who governs there, and who by his laws coerces every violence, by whomsoever it may be committed. Therefore the *Carthaginians*, though with a superior naval force, did not dare to attack the *Romans* in a port of the king of *Numidia*, as *Grotius* (after *Livy**) relates in l. 3., *De Jur. Bell. ac Pac.* c. 4. § 8. n. 2., and *Zouch*, *De Jur. Fec.* part 2. § 9. Q. 7., transcribes it out of *Grotius*. *Zouch* there states some contrary arguments, but *Grotius* had already mentioned and refuted them.

But as all the publicists (without any exception that I know of) prohibit the use of force in the dominions of another, it deserves to be considered, whether the usage of nations and the edicts of our princes† and states‡ are conformable to this opinion, and whether on this subject the right to pursue ought to be distinguished from the right to attack? To begin with the princes. *Philip II.* king of *Spain*,§ in the nautical laws

* *Liv* l. 28. c. 17.

† The counts of *Holland*, who were the sovereigns of that province before the *Dutch* revolution. T.

‡ The states-general of the *United Netherlands*, and the provincial states of *Holland*. T.

§ Who was also count of *Holland*, and sovereign under different titles of the seventeen provinces of the *Netherlands*. T.

which he gave to the *Belgians* on the last day of *October* 1563, (tit. 1. § 27.) ordered, on pain of death, that no violence should be done on the sea, by reason of war or for any other cause, on his subjects or allies, or on *foreigners*, within sight from land or from a port. He therefore understood the dominion of the continent to be extended as far as the sight can reach from the shore, and there are authors who are of that opinion. But I have shewn this to be too vague, in the second chapter of my *Dissertation de Dominio Maris*, being of opinion that the dominion of land ends where the power of arms terminates. And that the states-general and the states of *Holland* were of the same opinion, I think I have sufficiently proved by the two decrees made concerning the salute at sea, quoted in the said chapter 2, and also in chapter 4.*

Certainly it is by no means lawful to attack or take an enemy in the port of a neutral who is in amity with both parties. If it be done, it is the duty of the neutral state to cause the thing taken to be restored, either at its own expense or at the expense of the injured party. That it should be done at the expense of the latter has been agreed by the twenty-second article of the treaty of peace between the commonwealth of *England* and the states-general of the 5th of *April* 1654, the twenty-first article of the treaty of peace between the king of *England* and the states-general of the 14th of *September* 1662 and again by the 29th article of the treaty of peace between the same powers of the 31st of *July* 1667. The same is stipulated by the forty-eighth article of the commercial treaty between the king of *France* and the states-general

† The states of *Holland* decreed on the 3d of *January* 1671, that their ships of war should salute those of other sovereigns on their coasts within reach of the cannon of batteries and forts, precisely in such manner as the government of the country should require, leaving it entirely to its discretion to return or not the salute; adding, that every government is sovereign within its own jurisdiction, and every foreigner is a subject there. *Bynk. de Dom. Mar.* c. 2. On the 16th of *May* 1670 the same states decreed that the *Danish* fort of *Croneborg* situate on the shores of the sound in the *Baltic* sea, should be saluted in such manner as the king of *Denmark* should require. *Ibid.* c. 4.

of the 27th *April* 1662, but there is no mention made therein of the expenses being to be borne by the injured party, which appears to me to be very unjust, as it is the duty of the sovereign of the territory to revenge the injury done to himself; for it is an injury done to him to violate a port which is equally open to all his friends. And what if he who committed the violence goes away immediately? Is the individual, whose vessel, perhaps, has been taken, to make war at his own expense? Therefore the mention of the expense is properly omitted in the thirty-fifth article of the treaty of commerce which was made between the same powers on the 10th of *August* 1678, in the fortieth article of the treaty of commerce between the same of the 20th of *September* 1697, and again in the thirtieth article of the treaty of commerce between the same of the 11th of *April* 1713, for later treaties are generally without any further examination copied from the former ones, as we have seen just now to have been the case with the *English*. Those articles of treaties between *France* and the states-general only stipulate that the sovereign of the port, bay or river in which a prize shall be made from a friend, shall use his utmost endeavours that the captured property be fairly and justly restored. If it be the duty of the sovereign to use his utmost endeavours to effect that purpose, it follows that he must do it at his own expense, nay, by going to war, if other means are not sufficient. Such is the law which is observed among all nations, and there is no other reason for it than that it is not lawful to commit violence within the territory of another, and that ports, bays,* and rivers, are also within the territory of the sovereign of the country. Thus the grand duke of *Tuscany*, in the year 1695, caused the *French*,

* In the year 1793 the *British* ship *Grange* was captured by the *French* frigate *L' Ambuscade*, in the waters of the bay of *Delaware*, and brought into the port of *Philadelphia*, to which she was bound. The *British* minister demanded her restitution of the government of the *United States*. In vain did the *French* minister, *M. Ternant*, allege that the bay of *Delaware* was an open sea, not subject to the exclusive jurisdiction of the *American* government. His arguments had no effect, and the *Grange* was very properly restored.

who had taken near the port of *Leghorn* a ship of the powers allied against *France*, who were friends to the grand duke, and carried her into that port, to restore her immediately; for, as I have said, the sea which is near to the ports of a sovereign is a part of his territory. These principles may easily be applied to the following cases:

In the year 1639, while admiral *van Tromp* was blockading in the *Downs* the fleet of the *Spaniards*, who were in amity with *England*, the states-general; on the 21st and 30th of *September* 1639, issued decrees by which they ordered him "to destroy the *Spanish* fleet, without paying any regard to the harbours, roads, or bays of the kingdoms where it might be found, even though the *English* should make resistance," and the admiral immediately carried that order into execution, and was praised and approved for it by the states-general, as is commemorated by *Aitzema* in various places.*

This can hardly be defended, neither can the conduct of the *English*, who, on the 12th of *August* 1665, took some ships of our *East India* company, in the port of *Bergen*, in *Norway*,† not without great indignation in the *Danes*, who repelled the *English* with all their might. In order, however, that the case of *van Tromp* may not be considered as too outrageous, two things are to be attended to; the one, that the *English*, in the year 1627, had taken out of *Holland* a ship of the king of *France*, then at war with *England*, but in amity with the states-general;‡ the other, that the *Spaniards* themselves, in the year 1631, were charged with having committed hostilities against the ships of the states-general, in the ports of the king of *Denmark*, then a common friend to both, as I read in *Aitzema*.§ Otherwise, if nothing can be charged that gives just cause to exercise the right of retaliation,¶ it is manifestly unjust to attack an enemy in the port of a common friend. And thus the states-general decreed in the year

* Aitz. l. 19.—† Ibid. l. 45, 6, 7.—‡ Ibid. l. 7. 9. 19. 20.—§ Ibid. l. 11.

¶ But see page 33, where our author justly contends that retaliation is only to be exercised directly against the enemy, and never through the injury of a friend.

1623,* on a memorial of the *English* ambassador. The ships of the states-general had committed hostilities against the ships of *England*, in the river *Elbe*, a neutral river. Great complaints were made on this subject, not only by the *English*, but by the *Hamburghers*, and various ambassadors of the *Germanic* empire.† As to the complaints of the *English*, they could easily have been silenced, by reminding them of what had happened the preceding year at *Bergen*, in *Norway*, but it was not so with the others, for this aggression was solely founded on the right of retaliation. Nor can it be doubted that the *French* acted very unjustly, when in the year 1693 they set fire to certain *Dutch* ships in the port of *Lisbon*, at that time neutral, which the king of *Portugal* would not either permit to be fired at nor to be taken away. This fact I assert from my own memory.

It might be more doubted, whether it is lawful to pursue in the heat of battle an enemy met with on the high seas, into a neutral river, station, port or bay? The weight of argument is in favour of permitting it, on taking certain precautions which I shall enumerate by and by. Such certainly was the opinion of the states-general in the year 1623,‡ when they answered to the *English* ambassador that it was not lawful to commit violence in a neutral port, “with this understanding, however, that it was hoped his majesty would not take it amiss, if any *Dunkirkers* were met with on the high seas, that they might be pursued even along the king’s coasts and into the king’s ports.” The same opinion of the states-general appears expressed in their decree of the 10th of *October* 1652,§ but so, however, as is very properly added in it, that the castles of neutrals be spared, even though violence should be committed from them, and that the enemies also be spared, if they should have already entered the neutral ports. Both of these exceptions are right, for it is better to suffer within the dominions of another than to act, and if we act, we are to be very careful that the force used against our enemy shall not

* Aitz. l. 3.—† Ibid. l. 45, 6, 7.—‡ Ibid. l. 3.—§ Aitz. l. 32.

hurt our friend. If therefore two fleets fight in the open sea, I do not pretend that the conqueror may not justly pursue the conquered fleet, even though it should be driven to the territory of a neutral. But I approve the direction of the states-general in their decree of the 10th of *October* 1652, to abstain from violence in the port itself, because violence could not be done there without danger to the neutral. On this principle it is not lawful to begin an attack on the sea near the land, within shot of the cannon from the fortresses, but it is lawful to continue an attack already commenced, and pursue the enemy into a jurisdictional sea even close to the land, or into a river, bay or creek, provided we spare the fortresses, though they should assist the enemy, and provided there be no kind of danger to our friends.

From facts which afterwards took place, the states-general appear to have approved even thus much; for when in the year 1654 a *Dutch* commander met an *English* vessel on the high seas and pursued her flying into the port of *Leghorn*, where he took her at the moment she was coming to anchor, the grand duke of *Tuscany* complained of it to the states-general, but we read that he complained in vain.* He, however, afterwards took satisfaction, by condemning the *Dutch* vessel that had made the pursuit and occasioned the capture of the *English* one.† Again, when the *Ostenders* had fired at a *Dutch* ship which was pursuing an *English* vessel into the port of *Ostend*, the states-general‡ complained of it to the court of *Spain* as of an illegal act, because the *Dutch* ship had not fired at the *English* vessel in the port of *Ostend*. But this reason is not good, except to aggravate the injury done to the *Ostenders*, for it is not of any consequence what kind of hostility you commit on your enemy, but whether you attack him in a hostile manner. Upon the whole, it appears that the states-general approved both the pursuits that I have mentioned, because the force was begun before, and was only continued.

* Aitz. l. 4.—† Ibid.—‡ Aitz. l. 45.

The law is the same at land as it is on the sea; so that there as well as here we may justly pursue an enemy flying from a recent fight into the dominion of another. I think the states-general acted in conformity with this opinion when they decreed, in 1653,* that the *Lorrain* soldiers, who had ravaged the *Dutch* dominions, might be pursued even into the dominions of the king of *Spain*; but this cannot be defended, unless it is a fresh pursuit from a conflict or devastation immediately preceding. Otherwise, we may not any more make use of the territory than of the port of a friend, to destroy our enemy. And the states-general very properly, at the request of the king of *France*, who was at peace with the king of *Spain*, forbade upon pain of death, that any one should commit hostilities against the *Spaniards*, in the dominions of the king of *France*.†

The states-general also justly complained of the *Spaniards*, when in the year 1666, those of *Munster* passed through their territory to commit depredations in the dominions of the states-general, and they demanded of *Spain* an indemnity for the damage which they had suffered from them. This demand‡ might have been just, if the *Spaniards* had willingly and knowingly permitted those of *Munster* to pass through their territory, in order to go and commit depredations; but it does not any where appear that the case was so. If they knew it, it was their duty to prevent any hostility being committed against their friends from their territory.

Therefore I do not approve of the conduct of those of *Wolffenbittel*, who, in the year 1700, being, as is said, neutral, permitted the *Saxons* to commit depredations from their territory on those of *Lunenbourg*, and in like manner permitted the allies of the *Lunenburghers* to kill the *Saxons*. At the utmost it is lawful, after a recent fight, to pursue the flying enemy into another's dominion; for the same reason that *Philip II.* king of *Spain*, by the seventy-sixth section of his criminal edict of 1570, gave permission to pursue a criminal immediately and *flagrante delicto* into a territory not our own. But it is one thing to begin

* Aitz. l. 33.—† Aitz. l. 2.—‡ Aitz. l. 46.

a hostility, and another to pursue the force while the thing is yet warm. For it is not a new doctrine, that an act lawfully begun may be continued where it would not have been lawful to give it a beginning. In short, it is not lawful to begin force within the territory of a neutral, but if begun out of that territory, it is lawful to continue it there in the heat of action, *dum fervet opus*.

Thus it seems that this distinction may be made and contended for without absurdity. Yet I have never seen it mentioned, either in the writings of the publicists or among any of the *European* nations, the *Dutch* only excepted. Nevertheless, reason both persuades and commands it, and it is made use of in other analogous cases. If we attend to it, we shall without difficulty decide on the following fact: A *Spanish* ship pursued by a *French* ship (the two nations being at war) fled into *Torbay*, was run aground there, and concealed her cordage, tackle, sails, &c. in the houses of the inhabitants. The *French* mariners went on shore and took those articles from the houses they were in, and carried them on board of their own ship. Now was it lawful for the *French* to attack the houses of the *English*, and to take away the things that were protected there? It could not be done without injury to the *English*; therefore the king of *England* in the year 1668 very properly ordered every thing to be restored, and recommended the prosecution of the national injury to his ambassador in *France*, as we are told by *Aitzema*.* The same author relates† other complaints of the *English* for the violation of their ports by the *French*, and informs us of the damages which they paid therefor, but I shall not particularise those cases; the reader will judge of them by attending to the distinction which I have just now suggested, if he is as satisfied with it as I am.

* Aitz. l. 48.

† Ibid.

CHAPTER IX.

Of Neutrality.

I CALL neutrals (*non hostes**) those who take part with neither of the belligerent powers, and who are not bound to either by any alliance. If they are so bound, they are no longer neutrals, but allies. *Grotius* has called them middle men, (*medii*) l. 3. *De J. B. ac P.* c. 9. Of these it is asked what is lawful for them to do or not to do between two belligerent parties? Every thing, perhaps it will be said, that it was lawful for them to do or to omit doing when they were all at peace, for the state of war does not seem to extend farther than to those who are at war with each other. Does reason require, will you say, that the enemies of our friends should be considered as our own enemies? If not, why shall not our friends carry to their friends, though they be our enemies, those things which they were in the habit of carrying to them before? nay, arms, men, and every thing else? It militates, indeed, against our own advantage, but we are not considering what is advantageous, but what is reasonable. The injury suffered is alone the cause of the war, and it is evident that that injury has no effect beyond the person of him who has suffered it, except, that if he is a prince, it extends also to all his subjects, but not to those who are not subject to his dominion. Whence it must follow, that my friend's enemy is not my enemy, but that the friendship between us subsists precisely as it did before the war.

* It is remarkable that there are no words in the *Latin* language which precisely answer to the *English* expressions, *neutral*, *neutrality*; for *neutralis*, *neutralitas*, which are used by some modern writers, are barbarisms, not to be met with in any classical author. These make use of the words *amici*, *medii*, *pacati*, which are very inadequate to express what we understand by *neutrals*, and they have no substantive whatever (that we know of) for *neutrality*. We shall not here inquire into the cause of this deficiency. Such an inquiry would carry us too far, and does not comport with the object of this work.

We find that the counsellors of the states-general adopted this doctrine, when on the 3d of *March* 1640 the states issued an edict on their report, declaring that *agreeably to ancient custom and to the law of neutrality*, it was lawful for neutrals to fight for us or for our enemies as they might think proper. And when the *Spaniards*, on the 30th of *March* 1639, issued an edict declaring that if any of the people of *Liege* had enlisted in the service of the states-general, they should return within one month, having first taken an oath that they would no more fight against *Spain* or the house of *Austria*, otherwise, every pardon would be denied to them, a similar edict was made in retaliation on the 3d of *March* 1640, in the name of the states-general, of which I remember that it was to be in force as long as that of *Spain*, which in the said edict of the 3d of *March* 1640 was represented as an innovation, entirely devoid of reason, and stigmatized in these words: "*an unreasonable edict—such novelty and unreasonableness—so long as the Spaniards shall continue in force their unreasonable edict,*" &c. Such also was the opinion of certain *Dutch* citizens, expressed in the states of *Holland*, on the 26th of *February* 1684, when they urged the sending of auxiliary troops to the *Spaniards*, to be employed against the *French*, which they said could be done without injury to the peace then subsisting with *France*, *salvâ pace et amicitia cum Francis*.

But certainly this opinion is not to be approved, if we speak of those who are simply neutrals. It is their duty to be every way careful not to intermeddle at all with the war, and not to do more or less justice to one party than to the other. It is the same thing that we read in *Livy*, b. 35. c. 48. *Bello se non interponant*, let them not intermeddle with the war, that is to say, *in causâ belli*, as to what relates to the war, let them not prefer one party to the other, and this is the only proper conduct for neutrals. I do not know whether what *Grotius* says, *De J. B. ac P.* c. 7. § 3., will be satisfactory: "The duty of those, says he, who abstain from the war, is to do nothing by which he who supports an unjust cause shall be made stronger, or whereby the motions of him who carries on a just war may be impeded." If I judge

rightly; a neutral has nothing at all to do with the justice or injustice of the war, it is not for him to sit as judge between his friends who are at war with each other, and to give or deny more or less to the one or to the other as he thinks that their cause is more or less just or unjust. If I am a neutral, I cannot be useful to one that I may hurt the other, *alteri non possum prodesse, ut alteri noceam*.

But, will you say, may not I send to each of them whatever I may think proper? It is what friendship requires. If one power makes use of what I shall send him for the destruction of the other, what is that to me? But you must not adopt such an opinion: you must rather believe, that the enemies of our friends are to be considered in two points of view; either as our friends; or as the enemies of our friends. If we consider them only as our friends, then it is proper to assist them with advice, soldiers, arms, and all that they may want to carry on the war. But inasmuch as they are the enemies of our friends, it is not lawful for us to do so, because we thus would prefer, *in causâ belli*, one of them to the other; and this the equality of friendship, which is first to be attended to, forbids. It is more important to preserve friendship with both, than by favoring one of them *in causâ belli*, thus tacitly to renounce the friendship of the other.

And indeed, what I have just now said is not only conformable to reason, but to the usage admitted by almost all nations. For although it be lawful for us to carry on trade with the enemies of our friends, usage has so ordered it, as I shall shew more at large in the next chapter, that we should not assist either of them with those things by which the war against our friends may be carried on. It is therefore unlawful to carry to either party those things which are necessary in war, such as cannon, arms, and what is most essentially useful, soldiers; nay, soldiers are positively excepted by the treaties of various nations, and sometimes also materials for building ships, which might be used against our friends, have been excepted. Provisions likewise are often

excepted, when the enemies are besieged by our friends, or are *otherwise* pressed by famine.* The law has very properly forbidden our supplying the enemy with any of those things; for it would be, as it were, making war against our friends. Therefore if we consider the belligerents merely as our friends, we may lawfully carry on trade with them, and carry to them any kind of merchandize, but if we consider them as the enemies of our friends, those merchandizes must be excepted, by means of which they might injure those friends; and this reason is stronger than the former, for in whatever manner we may assist one against the other, we do interfere in the war, which is not consistent with the duties of neutrality. From these reasons may be seen which had the most justice on its side, the edict of the *Spaniards* of the 30th of *March* 1639, or that of the states-general of the 3d of *March* 1640, of both of which I have spoken above.

Thus I have shortly laid down what has appeared to me to be the duty of those powers which are not bound by any alliance, but are in a state of *perfect* neutrality.† These I have

* It was probably on the principle which this vague word *otherwise* seems to indicate, that the *British* government issued their *provision order* against *France*, or rather against *neutrals*, on the 8th of *June*, and signed their convention with *Russia*, on the 25th of *March* 1793. If such is the *strict* law of nations, we must again repeat what we have said in a former note, that it is very nearly allied to *barbarism*. T.

† There are two kinds of neutrality, which some writers distinguish by the words *perfect* and *imperfect*, and others by *absolute* and *qualified*. *Absolute* neutrality is when the neutral is bound to neither of the belligerents by a treaty, the execution of which may affect the other in case of war, otherwise, his neutrality is no longer *absolute*, but *qualified*. Thus if a neutral is bound by treaty to admit the prizes of one party into his ports and not those of the other. At the beginning of the war of 1793 the *United States* were neutrals between *France* and *Great Britain*, and so our government declared them to be by that proclamation which at the time excited so much sensation; our neutrality, however, was not *absolute*; it was *qualified* by the treaties made with *France* in 1778, which, independent of the mutual guaranties and eventual alliance, contained several articles that applied only to a time of war. Between a *qualified neutrality* and an *alliance* there are many shades, and it is often difficult to draw the line which separates the one from the other. Our author, however, seems here to confound them together, and to consider every *qualified neutrality* as an *alliance*. T.

simply called neutrals, in order to distinguish them from allies and confederates. If the doctrine which I have contended for be correct, I cannot agree to the principle which I have seen advanced by many writers upon public law, to wit, that I may and ought to support and assist that one of my friends whose cause appears to me the best and the most just, not only by supplying him with military stores, but by going openly to war for him, if the case require it. This is not correct, for it is never right to interfere with the business of others. When neither of my friends has entered into any engagement with me, why shall princes, who are independent, and masters of their own actions, stand or fall by my judgment? It does not belong to me to avenge the injuries of every sovereign; it is sufficient if I avenge my own, and those of my allies. If, however, the injury done to another is such, that I may fear for myself, and there be no other hope left, but of being the last devoured, it may perhaps be admitted, that I ought to assist my oppressed friend; for it cannot be otherwise than impious to make war upon a friend, while he continues to be called such, and unless your friendship with him has been first dissolved.

As to allies and confederates, the thing is quite different. If two sovereigns with whom I am allied, are at war with other nations, I shall administer to both the succours which I am bound to give by treaty; but if they are at war with each other, shall I assist both, or only one of them, and which of them in preference? On this question the interpreters of the law are at variance with each other, not less so than nations themselves. *Gentilis, De Jure Belli*, l. 3. c. 18. relates various opinions, and adds his own; *Grotius, De Jure Bell. ac P.* l. 2. c. 15. § 13., and after him *Zouch, De Jure Fec.* part 2. § 4. Q. 28., lay down various distinctions. Certainly auxiliary troops shall not be sent to each ally, even though they be due by treaty; for it would be most absurd to send my soldiers to both, that they may fight against each other. Those who hire out their soldiers are often in that predicament, but this does not belong to the present disquisition. As to myself, I think that whether my allies are at war with a foreign nation, or with each other, the only thing to be distinguished, is which

of the two has the most just cause of going to war. If they are both engaged in a just war with foreigners, I shall render to both that aid which I am bound by treaty to give: if only one of them, I shall deny it to the other. If two of my allies are at war with each other, I shall perform the obligation of my treaty with respect to him who has the best cause, of which I shall be myself the judge, as you will hear by and by. And thus we may easily do without the opinions and distinctions of others.

But what if I have promised succours to my ally and confederate, and he is at war with my friend? I think that promises are to be performed, and may be performed, because allies constitute, as it were, one society to be defended by mutual assistance. But here I must distinguish, whether my ally has received an injury, or has inflicted one; if he has received it, I shall perform my promise: if on the contrary he is the aggressor, I shall not perform it, because I am not bound to assist my ally in an unjust cause. But whether the cause be just or unjust, is to be determined by the judgment of the party bound.*

I wish indeed, that what I have said of the justice and injustice of a cause, was clearly and roundly expressed in treaties between nations; but those which I have seen simply express, that the one ally shall furnish to the other, when attacked, so many naval or land forces, and no more is said. But when the treaties say *when attacked*, there can be no other interpretation, but that succours are to be given to that ally, who is unjustly made war upon; to him who is attacked by, not to him who attacks the enemy. However, I do not find that expression, *when attacked*, sufficiently clear. For what if he who is *attacked* should have done an injury to the other, and thus have afforded him a cause of

* Our author seems here to be at variance with himself. See the preceding page and page 66, where he says that "a neutral has nothing at all to do with the justice or injustice of the war," *belli justitia nihil quicquam pertinet ad communem amicam*. Much less does it concern an *ally*, or one who is bound by the solemn engagements of a treaty. See on this subject the able reasoning of Lord *Hawkesbury*, in his *Discourse on the conduct of the government of Great Britain in respect to neutral nations*. Lond. edit. 1794, p. 68.

war? shall I send succours to that unjust ally? No, I shall not. It should be said then, that to him who is *unjustly attacked*, succours should be sent, as likewise to him who has not afforded a cause of hostility, and whose fault or injury has not begun the war. Although, however, it be not openly expressed, that exception is always tacitly understood in treaties, which *Grotius* has proved, *De Jure B. ac P.* l. 2. c. 15. § 13. n. 1., and I do not know any who differ from him.*

He who has promised succours, and he alone, as I have just now said, judges also of the justice of the cause, and whether the *casus fœderis*, as is commonly said, has taken place or not. For the contracting parties are not in the habit of submitting that to the decision of arbitrators; which indeed would be very right, as treaties might not then be made sport of, as they now are. Otherwise, who is there, who will not interpret treaties as he may think will suit best his own interest? who will not evade them by a false interpretation?† The ancient *Greeks* and *Romans*, even in public matters, often left the justice or injustice of their cause to be determined by others, as is proved by many examples quoted by *Grotius*, l. 2. c. 25. § 4.; and it was right to do so. But this part of the law of nations is now disused, and hence hardly any thing now-a-days remains of treaties but an empty name.

This is only applicable to treaties made before the breaking out of the war, by which supplies have been promised; for in my opinion, after the beginning of the war, succours cannot be properly promised or sent to either friend, and he who will promise or send them to one, will violate his neutrality with the other.

As to those states which are tributary to us or under our protection, they constitute a kind of intermediate description of states; for, from the very nature of protection, they are not considered as enemies, nor also as subjects, as they belong to another prince. They may therefore assist their sovereign, though he is our enemy, but not with arms and men, wherewith

* Sec, however, the notes in the preceding page and page 75. T.

† Does not this militate against our author's doctrine in the preceding paragraph? See notes, p. 71. 75. T.

he may make war upon us. Therefore the counsellors of the states-general, on the 17th of *March* 1641, and afterwards on the 18th of *July* 1746, very properly decreed, that those of the territories of *Luxemburg* and *Namur*, who were under the protection of the states, and generally, on the 14th of *August* 1645, that no neutral under our protection should fight for the king of *Spain*, even though he had fought for him before, and that no one, who had quitted the service should be recalled into it. The same counsellors, on the 23d of *February* 1636, issued an edict, that none of those who were under our protection should assist the enemy's camps with horses, wagons, or ships: and very properly, because, by acting thus, they would have afforded assistance to the enemy. The law is different, as to those things which are carried to an enemy, for other purposes than for war; and therefore the states-general, although they had before generally prohibited the exportation of corn, decreed however, on the 23d of *May* 1631, that those who were under our protection might carry their corn to the *Spaniards* or to the *United Dutch*, as they might think proper. For a neutral may lawfully carry corn to an enemy, except in case of a siege or famine.

The states-general, by the third section of their edict of the 26th of *September*, 1590, prohibited the treating of neutrals, their vessels and goods, in a hostile manner, even though found in the enemy's territory, provided they were bound to the *United Provinces*, or thence to other places. Yet there are those who have written, as if the states-general on the 15th of *December* 1672, had decreed by a general law, that even neutral vessels, when coming from enemy's ports might be lawfully condemned. But no credit is to be given to those wretched scribblers; for the fact is that the edict of the 15th of *December* 1672, was a special one, and made merely by way of retaliation for the condemnation of the *Hamburg* ship, as I have before shewn in chapter 5.

CHAPTER X.

Of Contraband.

IT was formerly a capital crime at *Rome* to sell arms to the barbarians;* that is to say, it was capital in the subjects of the empire, for whom alone the *Romans* made laws. And it is now certainly so in every country, for a subject to carry arms to an enemy. Nay, by the first section of the edict of the states-general against *England*, of the 5th of *December* 1652, not only every subject, but a foreigner who should carry any kind of merchandize to the *English*, is to be considered as an enemy. Which by the second section of the edict of the states-general against the *Portuguese*, of the 31st of *December* 1657, is justly restricted to contraband goods. By the 1st section of the edict of the states-general of the 14th of *August* 1672, and 11th of *April* 1673, against the *English* and *French*, and the 1st section of the edict of the 19th of *March* 1665, against the *English*, he is punished as an enemy to the state, who carries to the hostile nation any warlike ammunition, provisions, materials for the building of ships, or any other prohibited merchandize. It is the same with a foreigner who carries those goods to the enemy from this country.

But the states-general as well as every other prince may make what laws they please with respect to their subjects; not so with respect to foreigners. Hence it is properly asked what is lawful for us by the law of nations to carry to the enemies of our friends, or, what is the same thing, what may our friends lawfully carry to our enemies? Whatever is not lawful to be carried, if the friend take it, he may lawfully con-

* Cod, quæ res export. non deb. l. 2.

fiscate, and by that confiscation alone, the whole penalty of the law is satisfied. *Grotius, de Jure B. ac P.* l. 3. c. 1. § 5. n. 1, 2, 3., being engaged in the consideration of this subject, distinguishes between those things that are useful for the purposes of war, those which are not so, and those which may be used indiscriminately in war and in peace. The first he prohibits neutrals from carrying to our enemies, the second he permits, the third he sometimes prohibits, and sometimes permits. If we adopt the principles which we have contended for in the preceding chapter, we cannot be much at a loss with regard to the first and second class of articles. As to the third class, *Grotius* distinguishes, and permits the intercepting of things of promiscuous use, but in case of necessity only, when otherwise we cannot protect our own, and then under the obligation of restitution. I shall only ask here who is to be the judge of that necessity, for it is very easy to allege it as a pretext? Shall it be I, who have taken the articles? Such, I think, is his opinion. But all laws prohibit my sitting as judge in my own cause, unless so far as custom, the prince of tyrants, admits, when treaties between sovereigns are to be interpreted. Nor have I been able to observe, that this distinction of *Grotius* is supported by the usage of nations; it rather confirms what he afterwards says, that it is not lawful to carry to besieged places, things of promiscuous use, because it would be assisting one party to the destruction of the other, as will be more fully explained in the next chapter. As to what he adds, in conclusion, that a distinction is to be made between the justice and injustice of the war, I think I have sufficiently proved in the preceding chapter, that it may be proper for *allies** in a certain case, but never for *neutrals*.

* Our author in the chapter to which he refers seems to consider *qualified neutrals* as *allies*, and indeed, as we have said, the line is often difficult to be drawn between a qualified neutrality and an alliance: but why should states be the judges of the justice of the war in one case more than in the other, and what has that to do with their engagements? Will they not in every case, as our author himself has before observed, decide for their own advantage? See notes p. 71, 72.

The law of nations on this subject is not to be drawn from any other source than reason and usage. Reason commands me to be equally friendly to two of my friends, who are enemies to each other, and hence it follows that I am not to prefer either in war. Usage is pointed out by the constant and as it were perpetual custom which sovereigns have been in of making treaties and laws upon this subject, for they have often made such regulations by treaties to be carried into effect in case of war, and by laws enacted after the war begun. I have said *by, as it were, a perpetual custom*; because one or perhaps two treaties, which vary from the general usage, do not alter the law of nations. It is agreed amongst almost all nations, that it is not lawful for a friend to carry arms to an enemy, or other things which come under the denomination of *contraband goods*; nevertheless, by the 10th section of the treaty of peace of *Westminster*, made in the year 1654, between the *English* and *Portuguese*, it was stipulated that it should be lawful for the *English* to carry those things to the enemies of the *Portuguese*, as is observed by *Zentgravius*, *De Orig. Verit. & Oblig. Jur. Gent.* art. 7. § 8. p. m. 296, 297. And the *Dutch* obtained the same privilege of the *Portuguese* by the 12th article of the treaty of peace between them of the 6th of *August* 1661. Otherwise the rule which is proved by an almost perpetual succession of treaties, is, that neutrals cannot carry contraband goods to enemies, and that if they do it and are taken in the act, the goods are forfeited; but with the exception of these, they may freely trade with either party, and carry any thing to them with impunity.

According to these principles it was free to the *Dutch*, by the 3d article of the marine treaty between *Spain* and the states-general of the 17th of *December* 1650, section 4, to trade with the *French* in any kind of merchandize, in the same manner that they could have done before the war between *France* and *Spain*; so however, that they should not carry from the *Spanish* dominions to the *French*, things that might be employed against *Spain*; but by section 5, the *Dutch* are prohibited from carrying contraband goods to the other enemies of *Spain*, and

by the 6th section those goods that are contraband are enumerated.

Again, by the 2d article of the abovementioned edict of the states-general against the *English*, of the 5th of *December* 1652, neutrals are prohibited from carrying to the *English* any ammunition of war, or any materials, serving to the equipment of vessels. Provision is also made against carrying contraband goods, by the 2d section of the edicts of 1665, 1672, and 1673, which I have already spoken of; there, after enumerating various species of contraband articles it is added, "and all other articles manufactured and prepared for warlike use." Nearly the same thing is found in the 27th and 28th articles of the commercial treaty between *France* and the states-general of the 27th of *April*, 1662; in the 3d article of the marine treaty between *Charles II.* king of *England* and the states-general of the 1st of *December* 1674; the 2d article of the treaty of commerce between the king of *Sweden* and the states-general of the 26th of *November* 1675; the 15th article of the marine treaty between the same powers of the 12th of *October* 1679; the 15th article of the treaty of commerce between *France* and the states-general of *August* 1671; the 11th section of the edict of the states-general *de contrabandis*, of the 28th of *July* 1705, and in several other treaties between different nations, some of which are enumerated by *Zentgravius*, l. 7. § 8.

From these I understand generally, that contraband articles are such as are proper for war, and that it is of no consequence whether or not they are of any use out of war. Very few are the implements of war, which are not also of some use out of war. We wear swords for the decoration of our persons, we make use of the sword for the punishment of criminals; nay, we even make use of gunpowder for our amusement and to express public joy. And yet there is not any doubt but that these come under the denomination of contraband articles.

Of those things which are of promiscuous use, it would be endless to dispute, and it would be so if we were to follow *Grotius's* opinion about necessity and the various distinctions which he brings forward. If we examine the treaties made

between the different nations, which we have already mentioned, and also those which exist elsewhere, it will be found, that every thing is called contraband, which is of use to belligerent nations in making war; whether they be warlike instruments or materials *by themselves* fit to be used in war. For what the states-general on the 6th of *May* 1667, decreed against the *Swedes*, that even materials, *not of themselves* fit for war, but which might easily be adapted to warlike use, were to be considered as contraband, was founded on a special reason, to wit, the right of retaliation; as the states themselves express it in the said decree.

And hence you will judge whether the materials themselves out of which contraband goods are formed are themselves contraband? *Zouch, de Jure Fec.* part. 2. § 8. Q. 8., appears, if any thing, rather inclined to this opinion. For my part I am not, because reason and precedents incline me to the contrary. If all materials are prohibited out of which something may be made which is fit for war, the catalogue of contraband goods will be immense, for there is hardly any kind of material, out of which something at least, fit for war, may not be fabricated. The interdiction of these amounts to a total prohibition of commerce, and might as well be so expressed and understood. And the 4th article of the said treaty of the 1st of *December* 1674; the 4th of the said treaty of the 26th of *November* 1675, and the 16th article of the said treaty of the 12th of *October* 1679, which prohibit neutrals from carrying arms to enemies, permit the carrying of iron, brass, metals, materials for building ships, and in short every thing which is not already prepared for warlike use.

Sometimes, however, it happens, that materials for building ships are prohibited, if the enemy is in great need of them, and cannot well carry on the war without them. When the states-general by the 2d section of their edict against the *Portuguese*, of the 31st of *December* 1657, prohibited the supplying the *Portuguese* with those things which by the general usage of nations are considered as contraband of war, they specially added by the 3d section of the same edict, that as they feared nothing from the *Portuguese* except by sea, no one should

carry to them even materials for building ships; thus openly distinguishing those materials from contraband articles, and prohibiting them only for a special reason expressly set forth. For the same reason, materials for ship building, are joined with instruments of war, in the 2d section of the edict against the *English* of the 5th of *December* 1652, and in the edict of the states-general against the *French* of the 9th of *March* 1689. But these are exceptions which confirm the general rule.

It is asked whether *scabbards* are to be considered as contraband? *Petrinus Bellus, de Re Militari*, part 9. n. 26, 27, 28., says that it has been so decided by the military judges, though he himself does not approve of that decision. *Zouch, De Jure Fec.* part 2. § 8. Q. 2., satisfied with giving out of *Bellus*, the arguments on both sides, decides nothing, according to his custom. For my part, I approve of the decision of the military judges, and I am opposed to the opinion of *Bellus*, because scabbards, although of promiscuous use, are however, instruments prepared for war. Without scabbards, swords cannot be used, and without swords there can be no war. Nay, *holsters, saddles* and *belts* are numbered among articles of contraband in the said 2d, 3d and 5th articles of the said edicts and treaties which I have above mentioned. *Holsters*, as to their use, do not differ in any thing from scabbards: the latter are cases for swords and the others for pistols. Certainly these might be excused, if they were in very small quantity; and the said third article of the treaty of the 26th of *November* 1675,* has also this exception: "unless those instruments should be in so small a quantity, that it might be inferred from thence that they were not designed for the use of war."

What shall we say of *sword hilts*? The same, I think, as of scabbards, for they are instruments fit and prepared for war, and are also included in the list of contraband goods, in some of the edicts and treaties which I have before cited. Of *saltpetre*, more doubt might be entertained, because it is not of itself an article fit to be used in war; and yet saltpetre is contained in all the lists of contraband articles which I have mentioned, for out of saltpetre gunpowder is made, which is now

* Between the states-general and *Sweden*; see p. 77.

the principal article used in war. Nay, I have observed that saltpetre is sometimes mentioned with the addition of gunpowder and sometimes without. Where gunpowder is omitted, saltpetre is mentioned in lieu of it; when both are mentioned, they are considered as synonymous words, unless saltpetre, on account of its important use in war, should have been excepted by nations out of those articles which of themselves are not fit for war.

Of tobacco, *Zouch* informs us, *De Jure Fec.* part 2. § 8. Q. 12. that there was a great contention between the *English* and the *Spaniards*, and that the latter considered it as contraband,* to the great indignation of the *English*, who went so far as to issue reprisals against them. What became afterwards of that controversy I know not; this I know, that I cannot concur in opinion with the *Spaniards*, because the fact is, that tobacco cannot be of any use in destroying the enemy. Nay, by the said 3d, 4th, 15th and 16th articles† it is lawful to carry tobacco to an enemy, for by the same articles, it is lawful to carry to the enemies of our friends all things which in the condition they are in are not fit for war, and tobacco is nominally included among lawful goods, by the 4th article of the said treaty of the 1st of *December* 1674.

It is clear by the l. 22. § 1. ff. *de Jure Fisc.* that if a pledge is forfeited, the *jus pignoris* is not thereby extinguished. Hence if neutrals had shipped contraband goods to our enemies and bound them for the freight, if the goods are taken in the course of the voyage, and condemned as contraband, the *Dutch* lawyers have given it as their opinion that the captain is entitled to his freight, as though the whole voyage had been performed. And it is related that it was thus decided by the court of admiralty of *North Holland*, on the 6th of *May* 1665, and of *Friesland*, on the 12th of *July* in the same year, on the principles that *res transit cum suo onere*, that the fisk yields to creditors, (*fiscus cedit creditoribus*‡) and others of the like

* The reason alleged was that tobacco might be used, as well as salt, to preserve provisions from corruption. *Zouch, ubi supra.* T.

† See p. 77, 78.

‡ In this country, and in *England*, the opposite maxim prevails. The sovereign is entitled to a priority of payment, *et creditores cedunt fisco.* T.

kind. But the court of admiralty of *Amsterdam* decided differently on the 9th of *July* 1666; they refused to allow freight to the captured, without prejudice, however, to his rights against whomsoever else it might concern. And this is very correct; for the freight is not due unless the voyage is performed, and the enemy has lawfully prohibited its being performed. Then contraband goods are condemned, either *ex delicto*, when the captain and mariners are no less in fault than the owners of the goods, or *ex re*, for the very carriage of the goods themselves; for although we cannot prohibit neutrals from trading with our enemies, yet we may prohibit their assisting them in the war to our destruction. Therefore what is condemned, is condemned without regard to any man, and is to be considered as if it had perished by the act of God, whereby the *jus pignoris* is extinguished.* I am not, however, astonished at those lawyers having been of opinion, that the master of the vessel has a lien for the freight on contraband goods that are condemned, I rather wonder that they have not allowed it in preference to the owners of the merchandize; for they have *jus in re*, a right of property, which is the strongest of all.†

It is denied that the subject of an ally or confederate, trading with a common enemy, may be punished by us, or his property condemned; because it is said that every one is bound only to obey the laws of his own sovereign, and therefore that an ally can have no control over him. But reason, usage and public utility, are opposed to that decision. The reader may, if he pleases, turn to what *Aitzema* has written‡ upon that subject; for my part, I shall abstain from it. As I am now only treating of what contraband *is*, such a discussion cannot with propriety be introduced in this place.

* This doctrine is now adopted as to *contraband* goods, which are condemned *ex delicto*; but not as to *enemy's* goods, which are condemned only *ex re*. In the latter case, when the conduct of the captured is fair, freight is generally allowed. See *post*, c. 14 in note. T.

† There seems to be no real difference here, for the master can only claim as agent for the owners, to whom the freight belongs. T.

‡ Aitz. l. 46.

CHAPTER XI.

Of Trade with blockaded and besieged Places.

I HAVE said in a former chapter,* that by the usage of nations, and according to the principles of natural reason, it is not lawful to carry any thing to places that are blockaded or besieged. *Grotius* is of the same opinion; for he reprobates the carrying any thing to blockaded or besieged places, "if it should impede the execution of the belligerent's lawful designs; and if the carriers might have known of the siege or blockade; as in the case of a town actually invested or a port closely blockaded, and when a surrender or a peace is already expected to take place."† Indeed, it is sufficient that there be a siege or blockade to make it unlawful to carry any thing, whether contraband or not, to a place thus circumstanced; for those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. If, therefore, it should be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or

* Above, c. 4. p. 31.

† *Si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advenit, ut si oppidum obsessum tenebam, si portus clausos, & jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit; si damnum nondum dederit, sed dare voluerit, jus erit rerum retentione cum cogere ut de futuro caveat, obsidibus, pignoribus, aut alio modo.* If he (the carrier) should by his supplies impede the execution of any lawful designs; as if I kept a town besieged or a port closely blockaded, and I already expected a surrender or a peace; he will be liable to me for the damage occasioned by his fault, in like manner as he who should make my debtor escape out of prison, or aid him in his flight to defraud me of my right; and if he has not occasioned to me any actual damage, but has been willing to do it, in that case, it will be lawful by the detention of his goods, to compel him to give security for the future, by hostages, pledges or in some other way. *Grot. de J. B. ac P. l. 3. c. 1. § 5. n. 3.* T.

blockade, which would be doing him an injury, and therefore would be unjust. And because it cannot be known what articles the besieged may want, the law forbids in general terms carrying *any thing* to them; otherwise disputes and altercations would arise to which there would be no end.

Thus far my opinion coincides with that of *Grotius*, but I cannot agree with him when he requires *an expectation of a surrender or a peace*,* and when he says immediately afterwards that even under those circumstances, the carrier is only bound to *an indemnity for the damage occasioned by his fault*, and if no damage has been suffered, that he may only be compelled by the detention of his goods to *give security that he will not do the like in future*. I wish that *Grotius* had not laid down such principles, which are neither consonant to reason, nor to the sense of treaties. For on what principle am I to be the judge of the future surrender or peace? and if neither is expected, is it then lawful to carry any thing to the besieged? I think on the contrary, that during a siege, it is always unlawful. It is not acting a friendly part to ruin, or in any way impair, the cause of a friend, and if so, why shall he who carried supplies to my enemy not be bound farther than for the damage occasioned by his fault? Such conduct has always been considered as a capital crime in subjects, nay, in neutrals, when previously warned by a proclamation, and often without such warning. As they are generally private individuals, who, impelled by the thirst of gain, are in the habit of administering supplies to the besieged; suppose, for instance, that such a one has been the cause that a city has not been taken, I should hardly think in such a case that any individual could be rich enough to repair the damage thereby suffered. And if he should be intercepted on his way to the besieged town with

* Our author appears here to have mistaken the meaning of *Grotius*. That writer does not, in our opinion, require as a *necessary ingredient* in a strict blockade, that there should be an expectation of peace or of a surrender, but merely mentions that as an *example*, and by way of putting the strongest possible case. We have transcribed the passage in the original language, with a literal translation in the preceding note, in order that our readers may be enabled to judge for themselves of the correctness of this remark.

the supplies that he is carrying thither, shall we be content with taking and retaining the articles, and that merely until he gives security that he shall not commit the like in future? I cannot subscribe to this opinion; being taught by the usage of nations, that the least punishment in such a case is the forfeiture of the things taken; and that a corporal penalty at least, if not a capital one, is often inflicted on the offender.*

Let us now turn to some treaties on this subject. By the 9th article of the marine treaty between the king of *Spain* and the states-general, of the 17th of *December* 1650, it is simply agreed, "that it shall not be lawful to carry goods, even not contraband, to places blockaded and besieged." The same clause is contained in a variety of other treaties† ‡ all of which, however, merely stipulate that it is unlawful to carry any thing to besieged or blockaded places, without affixing any penalty to the offence. But, if the carrying of any thing to a besieged town or place is illicit, it follows that every thing which is carried thither is to be considered as *contraband*; for every

* This is a very severe doctrine, and which certainly is not conformable to the usage of nations at the present day; but it must be observed that our author, as well as *Grotius*, only meant to speak of a strict and actual siege or blockade, where a town is actually invested with troops, or a port closely blockaded by ships of war, *portus clausus*, as *Grotius* emphatically expresses it; for at the time when those great men wrote, no idea was entertained of that enormous system of universal blockade, by means of edicts and proclamations, the effects of which have desolated the world for the last twenty years.

T.

† Treaty of commerce between the states-general and the king of *France*, of the 27th of *April* 1662, art. 29.—Marine treaty between the king of *England* and the states-general, of the 1st of *December* 1674, art. 4.—Treaty of commerce between the king of *France* and the states-general, of the 10th of *August* 1678, art. 16.—Treaty of commerce between the king of *Sweden* and the states-general, of the 12th of *October* 1679, art. 16, and a great number of other treaties.

‡ In our treaties with other nations, no other punishment is contemplated for a breach of blockade, than a confiscation of the ships and goods. In our treaty with *Great Britain* of the 19th of *November* 1794, art. 18, it is even stipulated that that punishment shall not be inflicted, except in the case of a vessel which shall, after being warned, attempt to enter a blockaded port. 2 *Laws U. S.* 484. A similar stipulation is contained in the 12th article of our convention with *France*, of the 30th of *September* 1800. 6 *Laws U. S.* Appendix xx.

T.

thing which is carried from one place to another contrary to law and *treaties** is *contraband*, and as such, is at least liable to forfeiture. Thus usage has established it, as will be more fully shewn in the sequel; it has also established that the offenders may be punished capitally, or with a milder punishment, according to the circumstances of the case.†

Not only towns or cities, but *camps* likewise may be surrounded with troops and as it were besieged. In such a case it is not more lawful to carry any thing to them, than to invested cities. But if they are not besieged, I see no reason why neutrals may not lawfully carry thither any thing which may be lawfully carried to towns, ports and places so circumstanced, that is to say, every thing which is not actually *contraband*. And yet, the counsellors of the states-general, in the name of the states, issued an edict on the 9th of *August* 1622, by which they decreed, that all who should carry any thing to the *Spanish* camp before *Bergen-op-Zoom*, should be considered as enemies. The same counsellors, on the 2d of *September* 1624, and on the 21st of *March* 1636, decreed the same thing against those who should carry any thing to the *Spanish* camp.

Those edicts are undoubtedly too unjust to be defended, if the camp to which they apply is not besieged, and the things

* Goods prohibited by treaty between the sovereigns of the captors and the captured, though otherwise they might not be considered as *contraband*, are condemned *ex delicto*, and no freight is allowed upon them. *The Neutralitet*, 3 *Rob.* 240. *Am. edit.* T.

† At this day, however, the only penalty which is inflicted for trading with a blockaded port is the forfeiture of the property detected in the pursuit of such trade. It is true, that on the strict principles of the law of nations, those who knowingly trade with blockaded ports, may justly be considered and treated as enemies, and so *Vattel* lays it down in his *Treatise on the Law of Nations*, l. 3. c. 7. § 117. But, in the manner that war is now carried on, such treatment cannot extend farther than the confiscation of the property, and perhaps, the imprisonment of the neutral captains and crews, which has sometimes, though rarely, taken place, and can only be justified (if at all) in very flagrant cases. *Vattel* does not mention any specific punishment to be inflicted in cases of this kind, though he relates the story of *Demetrius*, who hanged the captain and pilot of a ship carrying provisions to *Athens*, which he was besieging. But precedents are not now to be drawn from such barbarous times. T.

are not carried through the neutral's territory. The two first, however, extended to the subjects of the *United Netherlands*, to neutrals, and to the subjects of those states who were under the protection of the *Dutch*. But, although every sovereign has a right to enact with respect to his own subjects, what laws he may think proper, and no one can find fault with him for so doing; yet as far as they apply to neutrals, and the subjects of countries under the protection of the states, those edicts cannot be supported unless they are restricted to *contraband* only. The third edict of the 21st *March* 1636, relates to neutrals who should carry provisions or implements of war to the *Spanish* fortresses; but that was done, as is expressly mentioned, by way of retaliation, because the *Spaniards* had treated as enemies those who had assisted the town of *Maestricht* with provisions and arms. *Retaliation*,* therefore, removes the hardship of the edict as to provisions, which otherwise neutrals may lawfully carry, if there be no treaty to the contrary; but it is otherwise with arms and military stores, even though they be carried to a place not besieged, and so far this edict is perfectly just. As to other things, whether they were or not lawfully prohibited by the edicts of the *Spaniards* or of the states-general, depends entirely upon the circumstance of the places being besieged or not.

* It is but seldom that we are disposed to controvert the principles laid down by this excellent author, but we must here again refer the reader to what he says himself in chapter 4: *Retorsio non est nisi adversus eum, qui ipse damni quid dedit, ac inde patitur, non verò adversus communem amicum*. "Retaliation is only to be exercised on him who has inflicted the injury, and therefore justly suffers for it, but not on a common friend." See above, p. 33. How then can he maintain in the present instance, as well as in another (p. 61.) that an injury done to a neutral can be justified on the principle of retaliation upon the enemy? We would have supposed that national prejudice (as in both the above cases the *Dutch* were the authors of the injury to neutrals) had made him overlook the very principle on which he had set out in the beginning of his work, were it not that he applies it there against a similar act of his own government, and freely reproves their conduct in several other instances. Whatever may have been his motive, we are compelled to say that he is here in direct contradiction with himself, and that on his own clear and luminous principle, his justification of the conduct of the *Dutch* in these two instances cannot be supported.

T.

The same law which obtains with respect to towns that are really besieged, and by a parity of reasoning has been applied to camps, as being, as it were, besieged, applies also to enemy's ports, which are blockaded by ships of war, and therefore are considered as in a state of siege. There is on this subject a remarkable decree of the states-general, of the 26th of *June* 1630, made with the advice and opinion of the court of admiralty of *Amsterdam*, and of other courts of admiralty, nay, it is probable, with the advice also of some private lawyers.* At that time, the states were blockading with ships of war the maritime coast of *Flanders*; it was then made a question whether neutrals might carry on trade with the ports of that country, and upon that the states made the decree in question, which we shall here lay before our readers and accompany it with a few remarks.

The first article provided "that the ships and goods of neutrals which should be found going in or coming out of the enemy's ports in *Flanders*, or being so near thereto, as to shew beyond a doubt that they were endeavouring to run into them, should be confiscated, because their high mightinesses kept the said ports continually blockaded with their ships of war, in order to prevent any commerce between them and the enemy;† as had been the custom many years before, *after the example of all other princes, who had claimed and enforced a similar right in like cases.*"

By the second article it was ordered that the ships and goods should be confiscated, "if from the charter-parties, or other documents on board, it should appear that the vessels were bound to the said *Flemish* ports, although they should be found at a distance from them, unless they, of their own accord, before coming in sight of or being chased by our country's ships, should repent their intention, while the thing was yet undone, and alter their course; in which case the matter should be decided according to conjectures and circumstances."

* Consil. Holland. vol. 5. Consil. 161.

† The *Spaniards*, whose king was at that time sovereign of the county of *Flanders*, and of the rest of the Catholic *Netherlands*,
T.

The third article directs the confiscation of such ships with their cargoes, "as should come out of the said ports, not having been forced into them by stress of weather, although they should be taken at a distance from thence, unless they had after leaving the enemy's port performed a voyage to a port of their own country, or to some other neutral or free port, in which case they should not be condemned; but if in coming out of the said *Flemish* ports they should be pursued by our own ships, chased into another port, such as their *own* or that of their *destination*, and found on the high sea coming out of *such* port, in that case they might lawfully be captured and confiscated." There is also a fourth article, which I have recited and commented upon before,* and which I think it unnecessary to say any more upon. But the three first articles of this law appear to me to require some explanation.

As to the first article, inasmuch as it condemns vessels found actually going into or coming out of the enemy's ports, there is no reason for it, but that which is expressed in the edict itself. It goes however further, and confiscates those which shall be found *so near to the enemy's ports as to shew beyond a doubt that they intend running into them*. This is reasonable also; because if prohibited goods are found on the confines of the hostile territory, they are presumed to be carrying to the enemy, not only according to the most general opinion of the civilians,† but also according to the intent and meaning of the states-general, which is fully expressed in this law and in various other edicts,‡ unless, indeed, as is provided in all the said edicts, they should prove that they were driven in by stress of weather. The same exception is made in the second article of this decree.

But, not to leave the coast of *Flanders*, precisely the same thing was decreed on the same subject, in the infancy of our

* Above, c. 4. p. 30.

† Zouch, De Jure Fec. p. 2. § 8. Q. 10. quotes a number of authorities to this point.

‡ Edicts against the *English*, of the 5th December 1652, and 19th of March 1665, § 4.—Against the *English* and *French* of the 14th of April 1672, and 11th of April 1673, § 4.

republic; for by the edicts of the earl of *Leicester*,* by which he prohibits as well to foreigners as to subjects all commerce with the *Spaniards*, and by the edict of the states of *Holland*, of the 27th *July* 1584, neutrals, trading with the *Flemish* ports, are punished with the confiscation of their ships and goods, and that edict expressly provides that those “who shall be found on the coast of *Flanders*, or near “to some of the prohibited ports, shall be adjudged to have contravened this ordinance, *except in cases of extreme and well proved necessity.*” The opinion of *Cynus*, who writes that they are, even in such a case, to be punished as going to the ports of the enemies, when they have so far advanced on their way that they cannot return, is therefore not admissible, although it has the approbation of *Albericus Gentilis*.†

Thus much I have thought proper to observe on the first article of this law; the reasonableness of which applies equally to the second article; for those things which are taken near to besieged places, are not condemned for any other reason, than that an intention of trading with the enemy is tacitly collected from the internal evidence of the fact itself, and it amounts to the same thing, as if that intention had clearly appeared from the documents on board, and therefore there is no room for any doubt. But what is added about repentance, I find some difficulty to admit; if, however, there is sufficient proof of the alteration of the voyage, I should not be far from acceding to that opinion.

The third article properly distinguishes between vessels which are *chased* or compelled to take refuge and those who proceed *voluntarily* to the port of their *destination*. The latter are excused, when found coming out of that port, their voyage being considered as ended, and a new one begun, while the former are condemned, as being taken in the very act of violation of blockade. But on the subject of these, the edict speaks in the disjunctive, and says, “if they are chased into *their own port* or *the port of their destination*,” so that there may be a doubt as to the sense of these words and the law

* Edict of the 4th of *April* 1586—of the 4th of *August* same year, § 9.

† De advocat. Hispan. l. 1. c. 20. p. m. 86.

which results from them. Certainly there can be no doubt, if the same thing is meant by their *own port*, and the port of *their destination*; But if an *Englishman* who was bound to a port of *Denmark* is driven into a port of *England*, and coming out of it, and prosecuting his voyage, should be taken before he reached the *Danish* port, it appears to me that he would be taken in the course and in the very act of the illicit voyage, and that it would be of no consequence, whether it was his own port, or not, which he had entered into, if the voyage which he was engaged in had not been completely finished. Therefore, as disjunctives are frequently to be construed as conjunctives, I understand these words "*their own port*," in the said article, to mean the port to which the vessel was bound, and where her voyage was to be ended.* I shall put a case, in order more fully to illustrate my meaning: Suppose that a vessel from *Zierikzee*† is taken by the *Dunkirkers*, who condemn and sell her, and she is purchased by a *Scotchman*. By the 4th article of the said decree which I have above recited at large‡ it is only lawful to capture and condemn her, if found coming out of an enemy's port before she had entered into her *own* or into some *other free port*, but not afterwards. This vessel now belonging to the *Scotchman*, and coming out of *Dunkirk*, is met with, but not taken. She runs into *Tarmouth*, where she was not bound to, and coming out of that port, is captured. It is asked whether she is to be considered as having entered into *her own* port within the meaning of the edict? I cannot say that she is, because she has not entered into the port to which she was *bound*. The states-general in a similar case, with the advice of the admiralty of *Zealand*, decreed on

* We cannot perceive how any difficulty can arise as to the construction of this part of the edict; since, whether the vessel was chased into the actual port of her destination or into any other port of her own country, she is equally to be condemned according to the letter of the law as it is given to us. So that the interpretation which our author contends for, appears to us to be not only unnecessary but dangerous, as it would make a merely *constructive* offence, of what the legislator expressly made a *positive* one. T.

† A port of *Zealand*, in the island of *Schouwen*, at the mouth of the *Scheldt*. T.

‡ C. 4. p. 30.

the 27th of *January* 1631, that the vessel should be condemned, as being within the edict of the 26th *June* 1630.* † What is said, moreover, in this third article about a *free port*, is explained by the fourth; for that cannot be understood to be a free port, which is under the same king or government with another which is not considered as such.‡

This decree of the 26th *June* 1630, was for some time not carried into execution, and in the mean while a free commercial intercourse in 1642 carried on with *Flanders*. During that period certain neutral vessels, trading thither were captured by our vessels, and carried into *Zealand*. The contraband goods, however, were alone detained and condemned, and all the remainder was acquitted and released. It has been asked by what law the contraband goods were condemned under those circumstances, and there are those who deny the legality of their condemnation.§ It is evident, however, that while those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war,

* Aitz. l. 11.

† This decree appears to us to have been very correct, not because the vessel had gone into a port of her own country, different from that of her actual destination, which, if she had done *voluntarily*, would have been a sufficient excuse, but because she had run into the port of *Yarmouth* to avoid pursuit, and was captured coming from thence, in consequence of which she was clearly within the letter of the third article of the edict. T.

‡ The 4th article provides, that ships coming out of enemy's ports shall be condemned, if they are taken before they shall have been into *their own or other free ports*. (See above, p. 30.) Our author impressed with the idea that the words *their own* in the 3d article, only meant the ports of their actual destination, and being embarrassed by the words *or other free ports* in the 4th article, which clearly point to the opposite construction, thinks to get rid of his embarrassment, by assuming that *other free ports* cannot mean ports of the same country, that is to say, of the country to which the neutral belongs; thus arguing in a circle to which his first mistake unavoidably led him. We are loth to controvert the opinions of so great a writer, in any case, particularly when he is construing a law of his own country; but in the present instance the mistake is so obvious that we could not avoid noticing it.

T.

§ Consil. Holland. vol. 2. Consil. 21.

by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation.

But although, as I have observed, the rigour of this decree of the 26th *June* 1630, may be sufficiently justified, it may however, be relaxed, if it shall be thought proper, and it has in fact often been relaxed. When admiral *Van Tromp*, in the year 1645, blockaded the ports of *Flanders*, with the fleet of the states-general, and asked of them, what he should do with neutral vessels, they decreed on the 1st of *July*, that neutrals should by all means be prevented from entering the ports of *Flanders*, but that their goods, *not being contraband*, should not be condemned.* The states, on that occasion, deviated from the principles which their predecessors had adopted in 1630. But when men change, what is there to prevent opinions from changing likewise?

If the principles which I have contended for in this and the two preceding chapters are correct, it will be easy with their help, to decide on the difference which took place between the *English* on one side, and the *Poles* and other nations on the other, of which *Zouch* gives us a particular account.† ‡

* Aitz. l. 4. Ibid. l. 25.

† De Jure Fec. p. 2. § 8. Q. 7.

‡ The difference to which our author alludes, is related by *Zouch*, substantially as follows: Queen *Elizabeth* being at war with *Spain*, had prohibited neutrals from carrying on *any trade* with that country. The ambassador of the king of *Poland*, in the name of his master, complained of it to the queen herself, in terms rather indecorous, to which she replied with becoming dignity, and defended her conduct by alleging, that the kings of *Poland* and *Sweden* had acted in the same manner some time before in a similar circumstance. The fact was, however, that those sovereigns in the year 1572, being at war with the czar of *Muscovy*, had merely prohibited the intercourse of neutrals with the ports of *Livonia*, which they blockaded with their ships, and which was at that time the theatre of the war by land, so that if *Zouch* is correct in his statement, the two cases were not parallel. But *Elizabeth* at that time was flushed with her victory over the *invincible armada* of *Spain*, and thought that there were no bounds to her maritime power.

To the *Hanse Towns*, *Selden* informs us, that she gave as a reason for the same proceeding, of which they also complained, that their ships could not go to *Spain* without passing through the *English seas*, which they had no right to do without her permission. Indeed, that author tells us that the measure

CHAPTER XII.

Of the mixture of lawful with contraband goods.

IF a neutral carries at the same time, lawful and unlawful goods to the enemy, and the vessel should be taken, it is asked, "whether the vessel itself and the lawful goods that are on board are to be condemned on account of those which are unlawful?" The same may be asked, if from any other cause, lawful and unlawful goods are mixed together. This was one of the several questions which were proposed in the year 1631, by the admiralty of *Amsterdam* to the states-general, for the interpretation of their edict of the 1st of *April* 1622. But, although the states gave their answer to the other questions which were propounded to them at the same time, *Aitzema* informs us* that they kept this under advisement. And I do not find that any decision has been given upon it, either at that time, or at any time since; the states-general, however, on the 6th of *May* 1667, gave public orders to their courts of admiralty, that they should not condemn lawful goods, or even the ship, on account of illicit merchandize. Thus much and no more, we are told by *Aitzema*,† and the states-general express themselves in the same general terms, in their several edicts of the 11th *September* 1665.‡

was not merely intended by *Elizabeth* to distress her enemies, but also to assert her claim to the *dominion of the seas* (*dominii maris causâ*.) From his relation, however, and that of other respectable writers, such as *Thuanus* and *Camden*, it would seem that the prohibition was not general, as *Zouch* represents it, but was restricted to warlike stores and provisions, which at that time were by many considered as contraband. See on this subject, *Zouch*, *ubi suprà*.—*Selden*, *Mare Claus.* l. 2. c. 20.—*Camden*, *Annal. sub anno* 1597.—*Thuan. Histor.* l. 96.—*Marquard. De Jure Mercat.* p. 149.—*Koch, Hist. des Traités*, vol. 3. p. 19—28. T.

* L. 11. † L. 47.

‡ Consil. Belg. vol. 4. Consil 206. Q. 2.

But I am of opinion with the authors quoted by *Zouch*, in his treatise on the Law of Nations,* that there is a wide distinction to be made between the case where both the lawful and unlawful goods belong to the same owner, and that in which they are the property of different persons. If they belong to the same owner, then the whole may be lawfully condemned, as a just punishment for the offence; but on the contrary, if they are the property of different shippers, then the act of one of them ought not to affect the others. This distinction was very properly taken by the *Dutch* lawyers, on the 31st of *July* 1692.† The *Digest*‡ also affords a strong argument in favour of this opinion, where, speaking of the owner of the vessel, *Paulus* distinguishes whether he knew or not that unlawful goods had been laden on board; if he knew of it, as if it was done in his presence, the law in that case declares that the ship also is forfeited; if on the contrary it had been done in his absence, and therefore he did not know of it, then the vessel is to be restored to him because he is not in fault. *Zouch*,§ however, without making any distinction, relates a case from *Petrinus Bellus*, by which it would seem that lawful goods had been condemned on account of others which were illicit, but on referring to that author,¶ it appears, that in that particular case, both the lawful and unlawful goods belonged to the same owner, who knew of the fraud, and therefore was properly punished with the confiscation of both: But of this we shall speak more at large presently.

In the meanwhile we shall turn our attention to the treaties and laws of our country, which have been made upon the subject: By the treaty of navigation between *Spain* and the states-general, of the 4th of *February* 1648, and the 12th article of the marine treaty between the same powers of the

* De Jure Fec. p. 2. § 8. Q. 13. In the original, the reference is by mistake to Q. 3. T.

† Consil. Belg. vol. 4. Consil. 210.

‡ ff de Public. & Vectigal. l. 1. § 2.

§ *Ubi supra*.

¶ *Zouch* does not point out where the passage is to be found, but it is in *Bellus's Treatise De Re Militari*, part 9. 22. 26. 27. 28.

17th, 1650, it is simply agreed, "that it shall not be lawful for the subjects of either country to carry contraband goods to the enemy of the other, otherwise, that such goods shall be confiscated. The same stipulation is contained in the 24th and 36th articles of the treaty between *France* and the states-general of the 27th of *April* 1662, but without any particular provision as to goods not contraband. In like manner, the several edicts of the states-general against the *English* and against the *English* and *French** after enumerating a long series of contraband articles, direct the confiscation of these, without saying any thing as to lawful goods which may be found with them.

But by the 7th article of the marine treaty between *Charles II.* of *England* and the states-general, a distinction is clearly made between lawful and contraband goods, and the latter, but not the former, are declared liable to confiscation; nay, if the unlawful goods are immediately delivered up to the captors, the ship is to be instantly released, with the remainder of the cargo, and suffered to proceed on her destined voyage. A similar provision is made in a variety of other treaties† in which they differ from the edicts above mentioned, which direct the ships to be sent into port for legal adjudication, in all cases where contraband goods are found on board. By the 7th article of the treaty of commerce between the king of *Sweden* and the states-general of the 26th of *November* 1675, it is only stipulated that contraband goods shall be confiscated, but not the ship or lawful merchandize. No provision is made, as in the other treaties, for the immediate release of the vessel and of the innocent part of the cargo.‡

* Of the 19th of *March* 1655, 14th of *April* 1672, and 11th of *April* 1673.

† Marine treaty between the *Swedes* and the states-general of the 12th of *October* 1679, art. 21. 26.—Treaty of commerce between *France* and the states-general of the 10th of *August* 1678, art. 21. 26.—Treaty of commerce between the same, of the 20th *September* 1697, art. 26. 31.—and of the 11th of *April* 1713, art. 25. 30.

‡ In the treaties of the *United States* with other nations, the most liberal principle has been adopted in respect to the seizure of vessels having contraband goods on board going to the enemy. By the 17th article of our treaty with *Great Britain* of the 19th *November* 1794, it was stipulated

Such are the rules laid down by our own laws and treaties, and if we are to infer from them what the law of nations is, it will follow as a principle, that ships and lawful goods are never to be condemned on account of contraband merchandize carried on board of the same vessel. But it is not from thence that the law of nations is to be deduced. Reason, as we have said before, is the supreme law of nations, and she does not permit that we should understand these things altogether generally and without distinction. As to the *vessel*, I think that it ought to be distinguished, whether she belongs to the captain himself or to others. If to the captain, I should here again distinguish, whether he knew (as is most frequently the case) that contraband goods had been shipped on board of her, or whether he was ignorant of it; as if the mariners, in his absence, had concealed such goods on board. If he knew of it, he is himself guilty of the fraud, because he hired his ship for an unlawful purpose, and she ought therefore to be confiscated; but it is otherwise, if he did not know it, because in that case, the fraud cannot be laid to his charge. Such is the doctrine laid down by *Paulus*,* and it is evidently conformable to the dictates of sound reason and of common sense.†

“that in all cases where vessels should be captured or detained on just suspicion of having on board enemy’s property, or of carrying to the enemy any of the articles which are contraband of war, the said vessel should be brought to the nearest and most convenient port; and if any property of an enemy should be found on board such vessel, that part only which belonged to the enemy should be made prize, and the vessel should be at liberty to proceed with the remainder, without any impediment.—2 *Laws U. S.* 483—and by our convention with *France* of the 30th September 1800, art. 20, it was agreed, that in case the vessels of either party should be captured for carrying contraband to the enemy, the contraband goods only should be condemned, “saving always the ship and the other goods which it should contain.” 6 *Laws U. S.* append. xxxii.

T.

* ff. de Public. & Vectig. l. 11. § 2.

† At present, neutral ships are not confiscated for carrying contraband goods to the enemy, though with the master’s knowledge. *The Neutralites*, 3 Rob. 240. *The Mercurius*, 1 Rob. 242. *The Jenge Tobias*, 1 Rob. 277. *Am. edit.*

T.

The same is to be said if the vessel belongs to another person, for *Paulus* applies his principle to the master only. If, therefore, the master has taken illicit goods on board, without the knowledge of the owners, their ship shall not be confiscated; but the law will be otherwise, if they knew of their being shipped, and thus have become parties to the unlawful act. It would be unjust, that the owners should suffer for the act of the master; but it is right and proper that they should suffer for their own. This distinction between the knowledge and ignorance of the captain is not so frequent at this time as it was formerly, because, according to the present usage, the master is in the habit of signing bills of lading of the merchandize shipped on board of his vessel, by which he promises that he will take good care of it for the shippers. It may, however, still apply, if nevertheless, unlawful goods should be privately conveyed on board of the vessel, without the knowledge of the master. But as to owners of the ship, others than the master, the rule may have even now a frequent application.

As to the owners of the goods, I think, that for the same reason, a distinction ought also to be made, as I have said above, and it ought to be distinguished, whether all the goods belong to one and the same person, or to several. If to one and the same, I think that the whole may justly be confiscated, exactly as by the *Roman* law in revenue cases, if any one carries at the same time lawful and unlawful merchandize, and declares the one and conceals the other, both are confiscated on account of the fraud of the carrier, as the commentators on the title of the Digest *De Publicanis & Vectigalibus** have properly collected from the text of that law itself, and from the third law of the code *De Nautico Fœnore*.† Others are pleased with another distinction, to wit: whether the lawful goods may be easily separated from the unlawful; if they cannot, then they are of opinion, that the whole is to be condemned, otherwise the contraband goods alone are to be confiscated, and the remainder to be released without consi-

* L. 11. § 2.

† See that law translated in the *American Law Journal*, vol. 3. p. 155. T.

dering whether it belongs to the same owner or not. But this distinction, as the separation can always be made, is neither founded on reason, nor on any authority of law. It is more reasonable, and at the same time more consonant to legal principles, to distinguish whether the lawful goods belong to another than the author of the fraud; then the principle properly applies, that one person should not be deprived of his goods for the fraud of another. This doctrine may be supported by a variety of authorities taken from the *Roman* law, in analogous cases; as if one of several co-heirs defrauds the revenue of the tax on dutiable property belonging to the estate of the deceased, the shares of the other heirs are not on that account to be confiscated.* In the same manner, if the farmer or servants of a landholder should manufacture iron on his estate, contrary to law,† if it should be done without the knowledge of the owner, he shall not suffer any penalty,‡ nor shall the bottomry or respondentia creditor suffer, if by the fraud of his debtor in shipping unlawful goods, the ship and cargo should be confiscated.§

But what if the owners of lawful goods should merely have known that others had laden unlawful merchandize on board of the same vessel? Shall this mere knowledge occasion also the confiscation of the lawful goods. Such appears to have been the opinion of a certain lawyer, which is recorded in the *Consilia Belgica*;¶ but I do not agree with him, nor do I find that he is supported by any authority; he might, perhaps, have appealed, (though he does not do it), to the abovementioned text of the Digest, where it is said, that the owner is not to suffer, if his farmer or servants have manufactured iron upon his estate without his knowledge: from whence he might have implied, that if the same thing is done with the knowledge of the owner, he ought to be punished, because it was

* ff de Public. et Vectigal. l. 8. § 1.

† By the *Roman* law, no individual was allowed to manufacture arms without the special permission of the government. Cod. l. 10. tit. 46. *Lex unica. Ut armorum usus incio principe interdictus sit.* T.

‡ ff de Public. et Vect. l. 16. § 11.

§ Cod. de Naut. Fœn. l. 3.

¶ Vol. 4. Consil. 10.

his duty to forbid it, and to order his farmer and servants not to do any thing unlawful upon his estate. But, if several owners, as is often the case, ship their goods on board of the same vessel, they have no control over each other, nor over the master who receives the goods on freight. Therefore, the owner of the lawful goods ought not to suffer for what he cannot prohibit; he might, indeed, not have shipped his goods on board of that vessel, but if it was not convenient for him so to do, he cannot be made answerable for the act or fraud of another person.*

Such is my opinion, and I wish that the several treaties and edicts which I have cited, had spoken more explicitly upon the subject. It will be said, perhaps, that the distinctions which are not therein expressed, are to be tacitly understood, and that thus the treaties and edicts may be interpreted according to each particular case. I wish that I could be of that opinion; but I fear that it cannot be done, because of the too great generality of the expressions. What *Albericus Gentilis* has written on all these subjects, is full of obscurity and confusion.†

* By the law of *France*, if a vessel is captured with contraband on board going to the enemy, the contraband goods only are forfeited, but the vessel and the remainder of the cargo are to be released, unless the contraband articles amount to three-fourths of the cargo, in which case, the whole of the merchandize on board is to be condemned, as well as the ship. *Ordin. of the 26th of July 1778*, art. 1. 2. *Code des Prises*, 672, *edit.* 1784.

The rule in *England*, is to condemn only the contraband articles, and to restore the rest of the cargo and the ship, but without freight; provided, however, that they belong to a different owner from that of the illicit goods, who did not know of the illegality of the voyage, and was not by himself or his agent, concerned in any fraud or concealment, to impose upon the officers of the belligerent nation, by masking the real destination of the ship, covering enemy's property, or otherwise, and was not acting in violation of a treaty of his own country.—The *Mercurius*, *Meincke*, 1 Rob. 242.—The *Mercurius*, *Geddes*, *ibid.* 70.—The *Yonge Tobias*, *ibid.* 278.—The *Princesa*, 2 Rob. 42.—The *Rosalie & Betty*, *ibid.* 292.—The *Franklin*, 3 Rob. 183.—The *Neutralitet*, 3 Rob. 240. *Amer. edit.*

T.

† *De Advoc. Hispan.* l. 1. c. 20.

CHAPTER XIII.

Of Neutral Goods found on board of the ships of enemies.

IN the year 1602, after the conquest of *Portugal* by the *Spaniards*, several *Portuguese* ships were captured by the *Dutch*, who were then at war with *Spain*. *Grotius*, who relates the fact,* says, "that it was more difficult to decide whether the goods of the *Italians* which were found on board of the captured ships, were lawful prize," and he adds, "that the matter was decided by a *compromise between equity and the law of war*." That respectable writer, therefore, doubted whether neutral goods found on board the ships of enemies, were to be considered as enemy goods; but he entertained no such doubt in 1625, when he wrote his treatise *De Jure Belli ac Pacis*; for in that work he expressly says: "That nothing is acquired by the law of war, but what belongs to the enemy, and not the property of neutrals, although it be found on the enemy's territory;" and he infers from thence, that the vulgar saying, "that goods found on board of an enemy's ships are to be *considered* as belonging to the enemy," is not warranted by the law of nations, but that such are only to be *presumed* enemy goods, until the contrary is proved. He adds, that it was so decided in *Holland*, in full court, in the year 1338, while we were at war with the *Hanse Towns*, and that that decision has passed into a law.† He gives it his approbation in another place, where he treats of the same subject.‡

I must own, that I blush at my ignorance, for not having been able to find that decision of the year 1338, nor can I understand by what court it was pronounced; for it is a fact of public notoriety, that it was not until near a century after-

* Hist. Belg. l. 11. sub anno 1602.

† De Jure B. ac P. l. 3. c. 6. § 5.

‡ Not. ad l. 3. de J. B. ac P. c. 1. § 5.

wards, that the court of *Holland* was instituted by *Philip of Burgundy*. This, indeed, was corrected by *Grotius*, in a new edition of his book, in which he substituted the year 1438 instead of 1338.* But in the latest edition, published in 1632, in the octavo form, (which *Grotius* himself certifies to be entirely correct), the year 1338 is again mentioned, and this date has been followed by those who have quoted that passage out of his book.† Even my learned friend *Barbeyrac* has preserved the same year 1338, in his *French* translation of *Grotius*,‡ and attributes that decree to the *states-general*, although they never exercised judicial powers, nor ever were considered as a court of judicature; at any rate, the true date of it must be the year 1438, as *Grotius* alludes to the *Hanseatic* war, of which there is a book preserved among the archives of the court of *Holland*, entitled *Oosterlingen*.§

Although that decree of the year 1438, has escaped my diligent inquiry, I nevertheless believe *Grotius's* assertion, without requiring any other proof of the fact, and I can easily conceive how others have followed his opinion on the credit of his character alone, and without its being supported by any other authority. Thus *Loccenius*|| speaks of the principle which *Grotius* lays down as being established law, and so do the six advocates whose opinions are recorded in *Consilia Belgica*.¶ I think, however, that they go too far when they seem to intimate that it would be otherwise if public notice

* In what we believe to be the last edition of *Grotius's* work, *Utrecht* 1773, the error appears to have been corrected. The decree there is said to have been pronounced in 1438. T.

† *Zouch*, de Jure. Fec. p. 2. § 8 Q. 25.—Consil. Belg. vol. 3. Consil. 253.

‡ It is not so in the *Amsterdam* edition of *Barbeyrac's* translation, printed in 1724, which Mr. *Bynkershoek*, it seems, had not before him when he composed this work. The decree there is said to have been given in 1438. T.

§ Or the *Easterlings*; by which name the inhabitants of the *Hanse Towns* were formerly known. T.

|| *Res in hostium navibus reperte præsumuntur esse hostium, donec contrarium probetur*. Things found on board the enemy's ships are presumed to belong to the enemy, until the contrary is proved. *Loccen. De Jure Marit.* l. 2. c. 4. n. 11. T.

¶ *Ubi supra*.

had been given that no neutral should ship his goods on board of an enemy's vessel, or if he who shipped them, was ignorant of the war.*

If by the general law of nations, it is lawful for a neutral to ship his goods on board of an enemy's vessel, I cannot conceive how it can be rendered otherwise by the proclamation of a belligerent sovereign. I am at liberty to carry on trade with two nations, who are in friendship with me, but at war with each other, unless I am prevented by express or tacit conventions, (as is almost always the case with respect to *contraband*;) what, then, if one of those nations, without the consent of the other, should prohibit altogether my trading with her enemy? Such an interdiction would be unjust as to all but the subjects of the prohibiting nation. *Grotius* appears to have been of this opinion,† otherwise he justly thinks that respect is due to the public proclamations of sovereigns, and that they are not to be disregarded with impunity.

As to the other point, what matters it, whether he who has shipped his goods on board of the enemy's ship, did or did not know of the war? Suppose that he did know of it, and that he also knew that the ship belonged to an enemy, the question will still recur, whether he has acted lawfully or unlawfully in shipping the goods? These fine spun niceties, although they may serve to make a display of legal ingenuity, cannot fail to be rejected by those who follow the rules of plain unsophisticated common sense.

Before I express my own opinion, I must first consult the treaties which have been made between different nations upon the subject. As far as I can understand, they nearly agree with the *French* law, which is laid down by *Mornac*,‡ *que la robe de l'ennemi confisque celle de l'ami*.§ *Grotius*|| attempts

* The same opinion is given in *Consil. Belg.* vol. 4. *Consil.* 207.

† *Ubi supra*, not. 4.

‡ *Ad l. Penult. § 1. ff. locati conducti.*

§ "That the goods of an enemy produce the confiscation of those of a friend." The word *robe* in the old *French* idiom signified *effects, goods, furniture, wearing apparel* and the like. *Roba* in *Italian*, *ropa* in *Spanish*, and *roupa* in *Portuguese* at this day, mean the same thing. T.

|| In not. ad l. 3. de J. B. ac P. c. 6. § 6.

to explain away the rigour of this law, and understands it to mean, that if enemy goods are shipped on board of a neutral vessel, *with the consent of the owner of the ship*, then the ship herself, though neutral, is liable to confiscation.* But this is not the subject before us, and will be treated in the next chapter. If, however, the consent of the owner of the vessel is the cause of her confiscation, why do we not confiscate *neutral goods*, which, with their owner's consent, are shipped on board of an *enemy's* vessel? Of this, *Grotius* has said nothing, and yet the rule of reciprocity required that the same law should be applied to both cases.

But if, setting aside for a moment these considerations, we turn to the treaties themselves: we shall find that they all simply stipulate, that "neutral goods found on board of an enemy's vessel, are liable to confiscation."† In this they have adopted the principle of the old *French* law, which confiscates the goods of neutrals merely because they are found on board of the vessel of an enemy,‡ and therefore do not agree with what *Grotius* states to have been decided by the court of *Holland*,

* But *Valin* rebukes him strongly for entertaining this opinion. "*Grotius*," says he, "pretends that our ordinances are to be understood with this restriction; it would, if it were admitted, furnish an excuse to the neutral master, with which he never would fail to elude the confiscation of his vessel and the remainder of his cargo." *Valin, Traité des Prises*, p. 64.

There is no doubt that such was the ancient law of *France*, and that it confiscated alike neutral goods found on board the enemy's ships, and neutral ships carrying enemy's goods; so true it is, that injustice has always followed power.

T.

† Marine treaty between *Spain* and the states-general of the 17th *December* 1650, art. 13.—Treaty of commerce between *France* and the states-general of the 27th of *April* 1662, art. 35.—Treaty between the same powers of the 10th of *August* 1678, art. 22.—Of the 20th of *September* 1697, art. 27.—11th of *April* 1713, art. 26.—Between *England* and the states-general, 1st of *December* 1674, art. 8.—*Sweden* and the states-general of the 26th of *November* 1675, art. —. And 12th of *October* 1679, art. 22.

‡ But by the same treaties, as will be seen in the next chapter, it was on the other hand stipulated that enemy's goods found on board of neutral ships should not be liable to confiscation, or in other words, that *free ships should make free goods*; so that if, in one respect, they were conformable to the old severe law of *France*, they established upon the whole, the more equitable principles of the *modern law of nations*.

T.

and to have obtained the force of a law. It is true, that the treaties which I have related are subsequent, and that they are of no force except between those who are parties to them. But the rule which they establish cannot be defended on rational principles: for why should I not be allowed to make use of my friend's ship to carry my property, notwithstanding his being at war with you? If treaties do not prohibit, I am at liberty, as I have already said, to trade with your enemy; and if so, I may likewise enter into any kind of contract with him, buy, sell, let, hire, &c. Therefore, if I have engaged his vessel and his labour, to carry my goods across the seas, I have done that which was lawful on every principle. You, as his enemy, may take and confiscate his ship, but by what law will you also take and confiscate the goods that belong to me, who am your friend? All that I am bound to do, is, to prove that they are really mine; for here I agree with *Grotius*, that there is some room for *presuming*, that goods found on board of an enemy's vessels are the property of the enemy.

But what shall we say, if the owners of the goods knew and consented that they should be shipped on board of the vessel of their friend, indeed, but of your enemy? I should think that this knowledge and consent do not authorize a confiscation. The matter depends upon this only question, whether the owners of the goods, in shipping them on board of an enemy's vessel have acted lawfully or unlawfully? I have contended for the former position, because, as I may lawfully carry on any kind of trade with your enemy, I think that I may therefore enter with him into any kind of contract, and make use, for a valuable consideration, of his ship for my own utility. Take, if you can, every thing which belongs to your enemy, but restore to me what is my own, because I am your friend, and in shipping my goods, I have not intended to do you any injury.

With what I have said, nearly agrees what is laid down in the *Consolato del Mare*, to wit: "that the enemy's ship when taken, belongs to the captors, and the neutral goods to the owners thereof, but that those owners may, if they are present, compound for the purchase of the vessel, and thus be

enabled to prosecute their voyage.* If, however, a composition does not take place, the vessel may be carried into a port of the captor, but still the goods are to be restored to their owners, on paying the freight thereof, in the same manner as if the voyage had been performed." I approve of this general doctrine; but what is said there on the subject of freight, I cannot admit to be founded in law. I understand very well, that he who has taken the vessel, has also taken all the right arising out of it which belonged to her or to the master; but the freight was not due to the ship, nor to the captain, unless the goods had been carried to their destined port.† The question, however, is asked, whether, if a ship is taken in the course of her voyage, the owner of the goods on board is obliged to pay freight to the captor? I answer, that if the captor is ready to carry the ship with the goods to the place of their destination, I think that he is entitled to demand his freight, otherwise I am of opinion that he is not. The shipper is sufficiently punished for his imprudence, in putting his goods on board an enemy's vessel, when he is obliged to claim them at his own expense, and to carry them away at his own risk. I have shewn, in a former chapter,‡ that difficult questions will arise respecting this matter of *freight*, and that it requires a sound judgment to form a correct opinion upon them.

* *Consol. del Mar. c. 273.* This chapter has been elegantly translated into English, by the learned Dr. Robinson, and is bound together with his interesting collection, entitled, *Collectanea Maritima*, London, Butterworth 1801. The passage referred to by our author, is in that translation marked §§ 6 & 7. In M. Boucher's French translation, it is c. 276. §§ 1012, 1013, vol. ii. p. 511.

† This doctrine of our author is fully recognised in England, where the captor of an enemy's ship is not considered as entitled to freight on neutral goods, unless he has carried them to the port of their destination. The *Fortuna*, 4 Rob. 228. *Am. edit.* It is, however, allowed in certain cases, when the goods are brought to the claimant's own country. The *Diana*, 5 Rob. 64. *Am. edit.*

‡ C. 10. p. 80.

CHAPTER XIV.

Of Enemy's Goods found on board of neutral ships.

IF a neutral ship be taken, having enemy's property on board, two questions are to be considered: the one, whether the neutral ship itself, the other, whether the enemy's goods are liable to confiscation?

As to the first question, if we follow the ancient law of *France*, a neutral ship will be liable to confiscation for carrying enemy's goods. That such was the law of *France*, in ancient times, is clear, by the exemption from it granted to the *Hanse Towns*, in their treaty with that country of the 10th of *May* 1655. *Grotius*, in the passage mentioned in the preceding chapter, is of opinion, that the *French* law does not extend farther than to the case of a neutral ship, the owner of which knowingly receives enemy's goods on board,* relying on that law of the *Digest*† in which, as I have said above,‡ a distinction is made between the master's *knowing* and his being *ignorant* of unlawful goods being laden on board of his ship; in the first case, but not in the second, the law directs the ship to be confiscated. *Loccenius*§ also distinguishes the present case in the same manner.

* See the note * p. 103.

† *Dominus navis, si illicitè aliquid in nave, vel ipse, vel vectores imposuerint, navis quoque fisco vindicatur. Quod si absente Domino, à magistro vel gubernatore aut proretâ navisve aliquid id factum sit: ipsi quidem capite puniuntur, commissis mercibus, navis autem Domino restituitur.* If the owner of the ship or any of the passengers shall put any thing unlawfully on board, the ship shall also be confiscated. If, however, it shall have been done in the absence of the owner, by the master, mate, or some of the mariners, they shall be capitally punished, and the goods shall be confiscated, but the ship shall be restored to the owners. *f. de Public. & Vectig.* l. 11. § 2.

‡ C. 12. p. 94

§ *Ubi suprà.*

This distinction of *Paulus** between the knowledge and ignorance of the master of the ship, is certainly very important, and has been very much attended to in the *Roman* law, but now is hardly of any force if the vessel belongs to the master himself; for it is generally he who receives the goods, and who attests their shipment by an instrument commonly called a *bill of lading*. It is of greater use, if the ship belongs to other owners than the captain, and he has received the goods without their knowledge, as I have already shewn in another place.† It may, however, be doubted, whether other owners, if they have given a special authority to the master to take goods on freight, and he has shipped unlawful merchandize, are not bound for his act? In general the rule is, that he who entrusts an unfit person with his business, is answerable for his faults and for the frauds that he commits; and if a distinction is made between the master and another owner of the vessel, the question will present itself in a pretty difficult point of view. But this is not the ground that I go upon. I am willing to admit, that the owners of the ship are bound for the act of the master, even without having given him a special authority; that the receiving of the goods was ordered by the owner himself, and that he knew in every case what goods were shipped on board of his vessel, and to whom they belonged; notwithstanding all that, I see no reason for confiscating the ship, merely for having enemy's property on board, whether or not the owner knew of or gave his consent to it.

I do not grant to *Grotius*, that the case which *Paulus* speaks of in the passage which he cites, extends to that which we are now contending about. Not because in those things which depend solely upon reason, the principles of the law of nations may not safely be sought for in the rules of *Roman* jurisprudence, but because the doctrine of *Paulus* has no application here. He only speaks of a master of a vessel, who, knowingly or unknowingly, carries goods in fraud of the revenue. In that case, it is true, that if the master acts with full knowledge of the circumstances, he employs his vessel and his labour for an

* The author of the abovementioned passage in the Digest.

T.

† Above, c. 12. p. 96.

unlawful purpose, and she is justly liable to confiscation; for he who conceals and knowingly carries on board of his vessel, goods which ought to be declared for the purpose of paying the duties thereon, commits a fraud upon the public. And therefore, at present, by the laws of almost every country, ships which are employed in defrauding the revenue, are confiscated, for no other reason than that they are employed in an illegal act.

I have myself adopted the same distinction of *Paulus*, with respect to contraband goods,* and have given it as my opinion, that if such goods were shipped on board of a neutral vessel, to be carried to the enemy, with the knowledge of the owners, the ship itself is also liable to be confiscated, unless there should be treaties to the contrary; because the owners in such a case are concerned in an act prohibited by law.

But now, let us pause and consider, whether he is guilty of any offence against the law of nations, who carries on board of his vessel the goods of his friend, although that friend is your enemy? By what right will you, who are my friend, capture my ship, merely because she carries your enemy's goods? I, who am a friend to both parties, shall serve them both, in those things that are not hurtful to either, and in the same manner both will serve me in things that are indifferent. On this principle, your enemy may with propriety hire his vessel out to me, and I am at liberty to hire mine out to him. Of those who act thus innocently and without fraud, I have treated more at large in the preceding chapter, and if what I have said there is correct, there is no need of saying any more upon this question, but it must be laid down as a principle, that a neutral vessel is not liable to be confiscated for having enemy's goods on board, whether the owner of the vessel knew of it, or not; because, in either case, he knew that he was engaged in a lawful trade; and in this his case differs from that of him who knowingly carries *contraband* goods to the enemy. Wherefore, on the present question, I do not admit the application of the distinction made by *Paulus*; but I approve of the

* Above, p. 96.

opinion which was given in general terms by the *Dutch* lawyers, and is recorded in the *Consilia Belgica*,* that a neutral ship, although laden with enemy's goods, is not liable to confiscation.

We will now proceed to consider the second question, whether the enemy's goods themselves, taken on board of a neutral vessel are liable to confiscation? Some will wonder, perhaps, that any doubt should be entertained about it, as it is clearly lawful for a belligerent to take the property of his enemy. And yet, in all the treaties which I have cited in the preceding chapter,† there is an express stipulation, that "enemy's goods found on board of neutral vessels, shall be free," or, (as we commonly express it), that *free ships shall make free goods*, except, however, contraband of war, when carrying to the enemy. And what will be thought more astonishing is, that among those treaties there are four to which *France* is a party, and according to them, even *enemy's goods* laden on board of neutral vessels are not liable to confiscation; much less, therefore, ought the *neutral vessel* to be confiscated, on board of which they are shipped. So that it must be said, either that the principle of the old *French* law which I have above mentioned, has been entirely abandoned, or, what is more probable, that those treaties are to be considered as exceptions to it. However this may be, we are bound, in the discussion of general principles, to attend more to reason than to treaties. And on rational grounds, I cannot see why it should not be lawful to take enemy's goods, although found on board of a neutral ship; for in that case, what the belligerent takes is still the property of his enemy, and by the laws of war, belongs to the captor.

It will be said, perhaps, that a belligerent may not lawfully take his enemy's goods on board of a neutral vessel, unless he should first take the neutral vessel itself; that he cannot do this without committing an act of violence upon his friend, in order to come at the property of his enemy, and that it is quite as unlawful as if he were to attack that enemy in a neutral port,

* Vol. 4. Consil 206. n. 2.

† Above, p. 103.

or to commit depredations in the *territory* of a friend.* But it ought to be observed, that it is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves which are on board, whether she is really neutral. If she appear to be such, then she is to be dismissed, otherwise, she may be captured. And if this is lawful, as on every principle it is, and as it is generally practised, it will be lawful also to examine the documents which concern the cargo, and from thence to learn, whether there are enemy's goods concealed on board, and if any should be found, why may they not be captured by the law of war? The *Dutch* lawyers, whose opinion I have already cited,† and the *Consolato del Mare*, in the chapter above referred to,‡ are equally clear upon this point. According to them, the neutral ship is to be released; but the enemy's goods are to be carried into a port of the captor, and there condemned.§

* It is worthy of observation, that our author, while he supports the belligerent principle, on the long agitated question, whether *free ships* "do or do not make *free goods*," tacitly admits, that neutral vessels are entitled to be considered as *neutral territory*, a proposition which Mr. *Hubner* thought so self-evident, that he did not think it worth while (though he professedly wrote in favour of the neutral doctrine) to devote a single page of his work to its proof and development. *Hubn. de la Saisie &c.* vol. 1. p. 211. This principle being admitted, the question is reduced to the single point: "Whether the right of taking enemy's property on board of neutral vessels, necessarily follows as a consequence of the right of search, for the purpose of ascertaining their neutral character?" On this point alone, the whole of our author's argument turns, and he maintains the affirmative; but like *Hubner*, he takes his proposition for granted, without taking any pains to demonstrate it. On the whole, he must be considered as having made a very important concession in favour of neutrals, and having greatly narrowed for them the field of that celebrated controversy. T.

† Consil. Belg. *ubi supra*.

‡ C. 273. § 2. of Mr. *Robinson's* translation, and c. 276. § 1004. of that of M. *Boucher*. T.

§ Above, p. 104. This opinion of our author is adopted, as we have shewn before, p. 105. in the case of neutral goods found on board of an enemy's vessel; but the contrary rule universally takes place in the case of enemy's goods taken on board of a neutral ship, in which case, as we have observed above, p. 81, the owner of the vessel is entitled to his freight, though he has not carried the goods to the place of their destination. Such is the opinion of

Those authorities say further, that the captor must pay the freight to the master of the vessel, but I do not think that opinion reasonable, because freight is not due, unless the goods have been carried to their port of destination. It may, indeed, be said, and with great truth, that it was not the fault of the master, that he did not carry them; but it must be said also, that when he took enemy's goods on board of his ship, he did it at his own peril, as he must have known that they might be taken, and thus be carried into a port of the captor. Therefore, he has no cause to complain, if his ship be merely dismissed without paying him any freight; unless it should be agreed between him and the captor, that he should carry the enemy's goods to the place of their destination, and thus have hired his vessel out to the captor himself. I have argued on this same principle in the preceding chapter, but in a case directly opposite; being that of neutral goods and an enemy's vessel.*

I shall not now turn to the particular cases in which this subject has been discussed. The reader, if he approves of the principles which I have laid down, will be able to form a correct judgment of what is said by *Albericus Gentilis*,† and *Zouch*,‡ on the same question, and of the controversy, which, as the latter relates, was once agitated with so much warmth between the *English* and the *Zealanders*.§ *Zouch*, himself, is

Vattel, which is at this day generally considered as law." *Si l'on trouve sur un vaisseau neutre des effets appartenants aux ennemis, on s'en saisit par le droit de la guerre: mais naturellement on doit payer le fret au maître du vaisseau, qui ne peut souffrir de cette saisie.* If on board of a neutral vessel, goods are found belonging to the enemy, they are seized by the law of war: but naturally, the freight is to be paid to the master of the vessel, who cannot suffer from that seizure." *Vatt. L. of N. l. 3. c. 7. § 115.* Such is also the rule in *England*, though very much restricted, and rendered almost illusory in practice. *The Atlas*, 3 *Rob.* 243. *Am. edit. in not.* *The Emanuel*, 1 *Rob.* 249. *The Rebecca*, 2 *Rob.* 84. *The Immanuel*, *ibid.* 172. *Am. ed.*

The reason of this rule is very plain, *enemy's goods* are not, like *contraband*, seized and confiscated, *ex delicto*, but merely *ex re*; for, he who carries enemy's property, is not guilty of any offence against the law of nations, as our author himself has ably demonstrated, above p. 108. T.

Above, p. 103.

† *De Advoc. Hispan. l. 1. c. 28.*—‡ *De Jure Fec. p. 2. § 8 Q. 6.*

§ It is related by *Zouch*, that in the year 1576, the merchants of the *Spanish Netherlands*, being in the habit of carrying on their commerce with

of opinion, that the neutral vessel ought to be released, and the enemy's goods confiscated; but, he thinks that freight ought to be paid to the master, in which he agrees with the *Consolato del Mare*, but not with me. He is, however, for allowing such freight only *pro ratâ itineris peracti*.* If his doctrine were correct, as in my opinion it is not, it would be very difficult to explain this restriction, on satisfactory principles.†

After writing thus much, the works of the learned *Heinecius* have come to my hands, and among them his dissertation "*On the confiscation of ships for carrying prohibited goods*,"‡ in which§ he briefly considers the two questions which are the subject of this and the preceding chapter. The perusal of that treatise has not induced me in the least to alter my opinion; I am, on the contrary, confirmed in it by the authority of so great a man. If the reader will take the trouble to compare what has been said by each of us on the same subject, he will be satisfied of the reason why I have not thought it necessary to make any alteration in this chapter, or in that which immediately precedes it.

Spain, then at war with the *United Provinces*, under cover of the *English* flag, the privateers of *Zealand* captured several *English* vessels engaged in that trade, and had them condemned as prize in their court of admiralty. He adds, that the *English* complained of it, and by way of retaliation, detained the ships of the *Zealanders* which they found in the ports of *England*, and imprisoned their commanders. But the prince of *Orange* prevailed upon the queen to accept of a compromise, by which the property taken was restored on both sides. *Zouch, ubi supra.* T.

* In proportion to the voyage performed. T.

† We have shewn in former notes, p. 81. 110. that contrary to the opinion of our author, freight is generally allowed to the neutral master in the prize-courts of *Europe*. And it is not only paid to him, as *Zouch* would have it, *pro ratâ itineris*, but *in toto*, and as if the whole voyage had been performed. The reason given for it, which appears founded on very sound principles, is, "that the captor represents his enemy, by possessing himself of his goods, *jure belli*; and that, although the whole freight has not been earned by the completion of the voyage, yet, as the captor, by his act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight." *The Copenhagen*, 1 Rob. 245. *Amer. edit.* T.

‡ *De navibus ob vecturam vetitarum mercium commissis.*—§ C. 2. § 9.

CHAPTER XV.

Of the Right of Postliminy on neutral territory.

IT has been questioned whether this right extends to persons or things, which, after being taken by an enemy, are carried by him into the territory of a neutral. It might be supposed that this question is settled by that passage from the *Digest*, in which *Pomponius* says, "that one of our people who has been taken by the enemy, is understood to be returned among us, if he arrives among our friends or upon our territory;"* and as the same law which, on the subject of postliminy, applies to persons, applies also to things, there does not appear to be any further room for controversy; for it seems, that under the general denomination of *friends*, *Pomponius* has meant to include *neutrals*, who are certainly entitled to that appellation. But *Grotius* construes it in a different manner;† he thinks, and in my opinion justly, that by the word *friends* are not generally to be understood, all those who are at peace with us, but only those who are engaged with us in the same war. He gives the same interpretation to what is said by *Paulus*, that "those are considered as having returned to us by right of *postliminy*, not only who have actually entered our territory, but who have arrived within the dominions of a *friend* or *ally*; because there they begin to be under the safeguard of the public faith."‡

If we take the words "*OR an ally*" conjunctively, (which we may, perhaps, do, in the same manner that we frequently construe a *conjunctive* into a *disjunctive*), *Paulus's* opinion will support the interpretation of *Grotius*; for an *ally* certainly

* ff. de Capt. & Postlim. Revers. l. 5. § 1.

† De J. B. ac P. l. 3. c. 9. § 2. n. 1 and 2.

‡ ff. ut *suprà*, l. 19. § 3.

comes within the description of the word *friend*. If, however, we take it in the *disjunctive* sense, it will be sufficient that it be a *neutral* or *friendly*, though not an *allied* nation. Of this opinion is *Albericus Gentilis*;^{*} but he is clearly in the wrong; because the reason which *Pauhus* gives, that the person who was taken begins, when on a friend's territory, to be under the safeguard of the public faith, applies as well and rather more to an *ally* than to a *mere friend*.

Of the same opinion with *Grotius*, and before him, was *Antonio de Gama*,[†] whom *Gentilis* on that account undertook to refute. *Zouch*,[‡] according to his custom, contents himself with relating the different opinions of others, and gives none himself, though he rather appears to incline to that of *Gentilis*. As to *Grotius*, he supports what he says merely by the authority of precedents, without adding a single argument of his own. "Among those," says he, "who are friends, but not allies, prisoners of war do not change their condition, unless it be so specially agreed by treaty," and by way of example, he immediately quotes the second treaty between the *Carthaginians* and *Romans*,[§] but *Zouch* very properly observes, that it does not sufficiently appear whether what the two nations agreed upon together is to be considered as a declaration of the law of nations, or as an exception to it. In various treaties, among the most ancient as well as the most modern, this is a question which it is often difficult to decide; and it is always dangerous to infer the law of nations merely from treaties, without also consulting reason. *Grotius* adds, in his notes, that it appears from *Thuanus*, that the king of *Fez* and *Morocco* was of the same opinion with him; but no one will be willing to be instructed by such masters in the law of nations.

* De Advoc. Hisp. l. 1. c. 1.

† Decisiones Lusitanicæ, 384.

‡ De Jure Fec. p. 2. § 8. Q. 2.

§ It was stipulated by that treaty, that if the prisoners made by the *Carthaginians* on some nation in friendship with the *Romans*, should come into the countries under the *Roman* dominion, they might be reclaimed, and should again become free; and that the friends of the *Carthaginians* should have the same right within the *Punic* dominions. *Gros. ubi supra*.

As to other writers, *Huberus** is of the same opinion with *Grotius*, when he understands by the word *returned*, one who is come back into the territory of an *ally*. *Hertius*† agrees also with him, and considers the right of postliminy as not being founded on the law of nations, but on municipal law. He decides on the question so often discussed among nations, “whether a prisoner of war, or captured property, which is brought into a neutral country, are entitled to their liberty by the right of postliminy?” He maintains that they are not; “because,” says he, “neutrals are bound ‘to take the *fact* for the *law*,’ and therefore cannot say that the capture was illegally made.”‡

But, indeed, if we chuse to consider this subject by the mere light of reason, this question appears to me so idle, that I wonder that it has exercised the minds of so many writers. He who returns among the allies of his sovereign, is entitled to the right of postliminy, because he is considered as having returned to his own country, for allies are considered as making but one state with ourselves.§ Certainly they are not to be considered as separate nations in respect to the war in which they unite their forces and mutual assistance. Therefore, by the word *friends*, which *Pomponius*|| makes use of, I would understand those who are such in the highest degree, that is to say, who are in alliance with us against the same enemy; and by *Paulus*’s expression,¶ “a *friend or ally*,”

* De Jure Civitatis, l. 3. § 4. c. 5. n. 11.

† Adnot. ad Puffend. De Jure N. and G. l. 8. c. 6. n. 25.

‡ Such is also the opinion of all the modern writers, and particularly of *Vattel*. *Le droit de postliminie n’a point lieu chez les peuples neutres; car quiconque veut demeurer neutre dans une guerre est obligé de la considérer quant à ses effets, comme également juste de part & d’autre, & par conséquent de regarder comme bien acquis tout ce qui est pris par l’un ou l’autre parti*. The right of postliminy does not take place among neutral nations; for whoever will remain neutral in a war, is obliged to look upon it, as to its effects, as being equally just on both sides, and consequently to consider as a lawful acquisition whatever is captured by either party. Law of Nat. l. 3. c. 14. § 208.

§ *Unam constituunt Civitatem*. See the *Henrick* and *Maria*, 4 Rob. 49. Amer. edit.

T.

|| Above, p. 113.—¶ *Ibid*.

I would understand him, who is at the same time in *friendship* and in *alliance* with us; for otherwise, it would have been sufficient to have made use of the word *friend*.* With such alone, because of the alliance, the right of postliminy

* The doctrine of *postliminy*, among the ancient *Romans*, applied principally to *persons*, it being the practice at the time when that country flourished, to make *slaves* of prisoners taken in war. To such, *Pomponius* and *Paulus* particularly meant to apply their principles on this subject, and therefore, it is not easy to refer them to the case of ships and goods taken at sea in a modern maritime war. Nor does it sufficiently appear whether those authors meant to speak of prisoners who made their *escape* into a friendly or allied country, as well as of those who came thither in the *possession* of their masters who had purchased them from the captors. It is possible, that a different rule might have obtained in each of these different cases. The civilians take too much pains to apply the principles of the *Roman law* to every case that presents itself; not considering, that the difference between ancient and modern manners renders them, in many instances, little susceptible of a direct application.

There would be, in our opinion, little difficulty in settling this question of *postliminy on neutral territory*, if a proper attention were paid to the distinction which the law has established between *military* and *civil* rights. We call *military* rights those which belligerents acquire in war, by capture or conquest, to the property of their enemies, and *civil rights*, those which are acquired out of war by contract or otherwise. These different rights receive a different kind of proof. *Military* rights are evidenced by *possession*, and *civil* rights by the ordinary proofs of *title*. A prize, therefore, which is brought into a neutral territory, in the *possession* of the captors or of their agents, does not return to its former owner, by the law of postliminy, because neutrals are bound to take notice of the military right which the *possession* evidences. But they are not bound to receive any other proof of it than the possession itself; for with the *mere right of property* of the captor they have nothing to do; the *right of possession* is the only thing that they cannot controvert, and in that, as *Hortius* says, they are bound to take the *fact* for the *law*. If, therefore, a vessel, after capture, should escape, or be brought into a neutral territory by others than the captor, his agents, or those who otherwise lawfully claim under him, as there is no longer any legal *evidence* of the military right, no *fact* which is to be taken for *law*, the civil right of the former owner revives, and the property returns to him by the law of postliminy. We do not mean to speak here of property regularly condemned in the tribunals of the captor; such a condemnation converts the *military* into a *civil* right, of which the sentence is the legal evidence.

For want of attending to these distinctions, the broad and unqualified propositions of our author have led many into an error.

takes place, but with those who are merely friends to both parties, the state or condition of our citizens, or of our property, does not change, because there is no reason for it. Wherefore, I wonder that *Gentilis* and others have been of opinion, that every thing which is brought into the dominions of a neutral country, returns by postliminy, and as a consequence thereof, that prisoners carried into the territory of a friend, become free.*

This doctrine, as to prisoners, is roundly asserted by *Joannes de Immo*,† and *Petrinus Bellus*,‡ with whom *Zouch* appears to concur in sentiment.§ But the contrary is so plain, that even sceptics have never seriously entertained a doubt of it; for all unanimously agree, that a right of property is acquired by capture in war, and that that right continues in the country of a friend. And if it be true, that the prizes which I have taken, and the prisoners that I have made, remain my property, by what right shall a prince, who is my friend, take from me those things which belong to me, *pleno jure*, and give

* By the law of nations, as at present understood, the right of postliminy takes place with respect to *persons*, even in a *neutral* country. For the moment that a prisoner sets his foot on *neutral* territory, no force whatever of the belligerent can protect him. "A privateer," says *Vattel*, "carries his prize into a neutral port, and there freely sells it; but he would not be allowed to put his prisoners ashore, in order to confine them; *for to keep or detain prisoners of war, in order to confine them, is a continuation of hostilities.*" Law of Nat. l. 3. c. 7. § 132. True, the captor may confine them on board of his ship, even though in the neutral's port, or within his jurisdiction; because a ship is considered as it were a part of the territory of the sovereign to whom it belongs. (See above, p. 109, 110.), but beyond that, no force can lawfully be exercised by a belligerent on *persons* in a neutral country.

If, however, a passage should be granted to a body of land troops through a neutral territory, there is no doubt that they might keep under confinement the prisoners that they had with them. For this power would be incident to the right of passage, which otherwise would not be effectually granted. And an *army* (as well as a *fleet*) is considered, *wherever it may be*, in many respects, as a *presidium* of the nation to whom it belongs. See above, p. 29.

T.

† Consil. 50.

‡ De Re Militari, p. 2. tit. 18. n. 12.

§ De Jure Fec. p. 2. § 9. Q. 8.

them up to another, though he be equally his friend? It is sufficiently clear, that he cannot do it without injuring me. Nor can he do it by his courts of justice, for he cannot lawfully judge between me and my enemy, without the agreement of both.* As therefore, what is taken in war remains the property of the captor, though in a neutral country, the *Swedish* ambassador was wrong, when, in the year 1657, he claimed certain letters of his, which had been intercepted by the *Danes*, with whom his sovereign was at war, and delivered to the states-general, who were his friends; contending that, by that delivery they had again become his own.†

Treaties, however, are sometimes made between sovereigns on a different principle, as was the case formerly between the *Romans* and *Carthaginians*, by the second treaty which *Grotius* quotes from *Polybius*. And thus, by the 20th article of the treaty of peace between the king of *Portugal* and the states-general of the 6th of *August* 1661, it was stipulated, that “what should be taken by the enemy of either, and carried into the port of the other, if demanded within a certain time, should be restored.” But such conventions cannot be made without injury to him who carries his prizes into the territory of his friend as into a safe place. Therefore, they effect no change in the principles of reason, or of the law of nations. For more upon this subject, see *Cunæus’s* dissertation *De Causâ Postliminii*, and *Loccenius, De Jure Maritimo*,‡ where the arguments of *Cunæus* are briefly stated.||

* As between the belligerents, the neutral is bound to see right wherever he sees possession: of a right unaccompanied with possession, he cannot take notice. We mean to speak only of rights acquired by or founded on the law of war, for of other rights he may judge as if no war existed. T.

† Aitz. l. 37. Because the possession of the captor continued in the hands of his donee; and because such things as letters and the like, when taken in war, do not require a sentence of condemnation to divest the right of property of the first owner. *Statim capientium sunt.* T.

‡ L. 2. c. 4. n. 6. 10.

|| *Ut enim victor intra propria præsidia tutus est, ita si amici fidem elegerit, & in sua præsidia se et sua contulerit, etiam illic publico nomine tutus est.—Serum est atque inutile, hostem tentare in alieno territorio vi suam alteri adimere; aut cum communi amico agere, ut sibi restituat. Nihil enim hostile aut*

This, however, is true only as to captures made in a just war, for if any thing has been taken by pirates, it is by all means to be restored to the former owners; and so it has been stipulated in various treaties between different nations.* And it is a rule generally adopted among all the nations of Europe, that a capture by pirates does not change the property, which subject has been treated more at large by others, as I shall shew hereafter.†

Agreeably to these principles, if my property, captured by enemies, comes into the territory of an ally, it returns to my use, and hence it is considered as if it had been delivered by my ally from the common enemy. And yet, the French in a similar case, formerly acted on a different principle, in consequence of which, the states-general, on the 4th and 5th of December 1637, decreed, that the same should be done with respect to them.‡ §

violentum vel ipse meliatur, vel alterum agitare in suos fines contra alterum patietur, quem FIDE PUBLICA in portum suum admisit. The same safety that the conqueror finds in his own fortresses, he will find in the dominions of his friend; if relying upon his honour, he has put himself and what belongs to him into his power, the public faith will protect him there. In vain shall his enemy endeavour to retake by force what was taken from him, or to prevail upon the neutral sovereign to restore it to him. The neutral sovereign will not commit an act of hostility against his friend, whom he has admitted into his country under the protection of the public faith; nor will he suffer any other person to hurt him within his territory. *Loccen. ubi suprad, in Scriptur. de Jure Nautico & Marit. Fascicul. vol. ii. p. 976.* We have thought that our readers would not be displeased with our transcribing this beautiful passage out of the writings of one of those Northern professors, against whom sir James Marriott has so unjustly and so illiberally vented his spleen. Vide his decree in the case of the ship *Columbus*, in the first volume of *Collectanea Juridica*. T.

* Treaty between the emperor of Morocco and the states-general, of the 24th of September 1610, art. 4.—Treaty of peace between the United Provinces and Portugal, of the 6th of August 1661, art. 20.—Treaty of commerce between France and the states-general, of the 27th of April 1662, art. 45.—Treaty of peace between England and the states-general, of the 14th of September 1662, art. 11.

† *Post*, c. 17.

‡ *Aitz*. l. 21. 24.

§ *Aitzema* relates, that France being in alliance with *Holland*, and both being at war with *Spain*, the French had refused to restore to the *Dutch*

It is more doubtful, whether a captor may in a neutral territory, sell the thing which he has taken from his enemy, and recover the price of the sale? By the 12th article of the treaty of peace between the *United Provinces and England*, of the 4th of *September* 1662, it was provided, that in such a case, if the consideration of the sale had not been paid to the captor, the property should return to its former owner, which article, in a particular case, that happened afterwards, the states-general ordered to be carried into execution.* But I would wish to know on what principle this stipulation was founded? And how, if the sale of the prize by the captor is lawful, his enemy can be made to derive an advantage from it? It will be difficult to account satisfactorily for this; for it is an established principle, that we may lawfully assist our friends, although enemies to each other, provided we do not supply them with implements of war, and do not shew more favour to one than to the other. It cannot, therefore, be required, that we should shut our ports against them, or prohibit all commercial intercourse between them and our citizens. I am of opinion, that this 12th article is to be classed among special treaties, the reason of which is often concealed from us; for in general, we are free to exercise the rights of

their property which they had recaptured from the *Spanish* privateers; whereupon, the *Dutch*, by way of retaliation, issued the edict which our author mentions, by which they ordered that no part of the *French* property which their vessels of war should retake from the *Spaniards* should be restored to the *French*, until they should pursue a different line of conduct with respect to them. 2 Aitz. p. 752. fol. ed. T.

* Aitz. l. 44. It is difficult to understand how prohibiting the sale of prizes in a neutral country is tantamount with interdicting all trade with the country of the captors; but this strong language of our author, shews how much he was in favour of the right of the belligerents to sell their prizes in neutral countries; and that this right exists, is not only the opinion of *Bynkershoek*, but of almost all the writers on the law of nations, and particularly of *Vattel* in the passage last above cited. The same right, however, should be granted to both parties alike, otherwise, the one to whom it is refused, will have a just right to complain. But neutral governments generally find it inconvenient to permit the privateers of contending nations to frequent their ports with their prizes at the same time, and therefore the right is either only granted to one of the parties, by virtue of a special treaty, or denied to both. T.

ownership over our property in a neutral country, whether we have acquired it by the law of nations, or by the municipal law.

Although it be lawful, on rational principles, to carry a prize into a neutral territory, and there to sell it if the captor thinks proper, laws have, nevertheless, more than once, been made to the contrary. The states-general, on the 9th of *August* 1658, issued an edict, by which they ordered, that no foreign captor who might be compelled by stress of weather, or some other reasonable cause, to bring his prize into the ports of this country, should presume to sell any part of it, or even to break bulk, but that he should inform the bailiff of the place of his arrival, who, having placed a guard on board of the ship, should keep a strict watch over her, until her departure, inflicting, moreover, a discretionary penalty, and a fine of one thousand florins, on any one that should assist in unlading, or purchase any thing out of her. To which edict, the said states-general, on the 7th of *November* in the same year, enacted a supplement, by which it was ordered that no prize-ship should be brought into the port itself, but merely into the outer roads, where she might be sheltered from danger, and that nothing should be unladen or sold out of her; and if any one should act to the contrary, the prize should be restored to the former owner, as though it had never been taken, and the captor himself should be detained, and his own vessel seized and confiscated. The remainder of the edict merely confirms that of the ninth of *August* above mentioned. Whether those edicts were extorted from the states-general, by fear or by any other cause, I do not know; but lest they should hereafter militate against rational principles, we must declare that we rather believe them to have been temporary than perpetual laws.

CHAPTER XVI.

*Of the Right of Postliminy as applied to cities and states.**

IT has been very properly said by *Grotius*,† that “the right of *postliminy* is applicable to a *whole people*, as well as to an *individual*, and that a political body, which was free before, recovers its freedom when its allies, by force of arms, deliver it from the yoke of the enemy.” *Hotoman* is of the same opinion, but there is some doubt whether this principle has been always and every where observed in the *United Netherlands*. In the case of *Groningen*, there is no doubt that it was attended to, as that city and province was admitted into the confederation, after we had reconquered it from the *Spaniards*, though it is to this day doubtful, whether they had ever before formally signed the articles of *Utrecht*, and they had certainly renounced them while under the *Spanish* dominion. Those articles had, however, been signed by the district of *Ommelanden*, which constitutes much the largest part of that province.

The inhabitants of the district of *Drenthe* were, on the 11th of *April* 1580, admitted into the confederation of *Utrecht*, but their country was afterwards invaded and occupied by the *Spaniards*. After the enemy had withdrawn and evacuated their territory, it seems clear, that they had recovered all their former rights, by virtue of the law of *postliminy*. Nevertheless, although they several times petitioned the states-general, to be readmitted into the union, no order has yet been taken upon any of their petitions; and once, in the year 1650, when, after having received a summons, which, it is said, the presi-

* We have taken the liberty to abridge several parts of this chapter, which, in the original, contains a variety of details, altogether uninteresting to us, and which do not at all elucidate the author's principles. T.

† De J. B. ac P. l. 3. c. 9. § 9. n. 1.

dent of the states-general had signed by mistake, their deputies attended at a meeting of the states, they were refused admittance. This certainly appears to be an act of injustice, particularly as neither the states-general nor the provincial states* have ever given any reason for their refusal to admit them, in which they persist to this day. It may, perhaps, be alleged, that the *Drenthers* did not renounce their allegiance to the king of *Spain*, as the other confederates did on the 26th of *July* 1581; consequently, that they remained under the dominion of the *Spaniards*, and are to be treated as a conquered country. But I would not exclude them on that account, as I am not clear that they forfeited the privileges of the *Dutch* union, merely because they did not renounce the king of *Spain*, nor do I find that this has ever been objected to them. Therefore, I see no reason why the *Drenthers* should not enjoy the benefit of the law of *postliminy*.†

The inhabitants of those parts of *Brabant*, which were under the dominion of the king of *Spain*, but were afterwards taken by the *United Dutch*,‡ also petitioned the states-general, in 1648, to be admitted into the confederation of *Utrecht*; but they were not even permitted to manage their own internal government. Some of the provincial states, however, gave power to their delegates to decide upon that business, but nothing was done in it. The *Brabanters* again petitioned on the 22d of *March* 1651, but to no purpose. Their case does not appear to come properly within the principle of the law of *postliminy*, for none of their cities, except *Breda*, had ever been admitted into the confederation of *Utrecht*. But as to the inhabitants of *Breda*, I entertain the same opinion which I have already expressed with regard to those of the district of *Drenthe*.

* Of *Over-Yssel*, within which the territory of *Drenthe* was included. T.

† They were not, however, admitted to that benefit, and they were still a dependent territory at the time of the invasion of *Holland* by the *French*. T.

‡ The districts of *Maesland*, *Kuyck*, and *Kempenland*, with the cities of *Boisleduc*, *Breda*, *Bergen-op-Zoom* and their territories, which constituted what was formerly called *Dutch Brabant*. T.

The case of *Guelderland*, *Utrecht*, and *Over-Yssel*, three out of the seven united provinces, comes much more properly within the law of *postliminy*. In the year 1672, they were taken by the *French*,* and afterwards recovered by us. While they were in the power of the enemy, they certainly were not entitled to their former rights as confederates, and on that account their delegates were very properly ordered not to attend any longer at the meetings of the states-general; but when those provinces again came into our possession, they were with equal propriety, considered as being restored to their former rights, by virtue of the law of *postliminy*. Indeed, the states-general decreed, on the 20th of *April* 1674, that those provinces should be restored to their former municipal and confederate rights, as they enjoyed them before their capture, except, however, that they deprived *Guelderland* of one vote in the assembly of the states, and several other conditions were, in fact, imposed upon them before they were readmitted into the union; for, they were informed, that they should swear anew to the articles of confederation, as if they were admitted for the first time. But if, by the operation of the law of *postliminy*, every thing is to be restored as if the captivity had not taken place, as it is every where understood, and is conformable to the usage of nations, every thing ought to have been restored to those provinces, which they possessed before their capture. They were, in my opinion, fully entitled to the benefit of the law of *postliminy*, and if so, why was a part of their rights retained? If, on the contrary, they were not, why was any thing granted to them?

It has been objected, I know, that the decrees of the states-general, on the subject of *postliminy*, speak of our *subjects* only, and that no mention is made in them of our *allies* and *confederates*; but that was not the question at the time when those decrees were made. Nay, even if the point were to be decided by those decrees, those should certainly be considered as *subjects* of this state or republic, who constitute so large a part of it. Others are more properly of opinion, that on the subject of *postliminy*, there ought to be no difference between

ourselves and our allies and confederates. Hence the decree of the states-general, of the 23d of *October* 1676, which I have mentioned above,* grants the benefit of that law, not only to those things which have been taken on board of our vessels, and afterwards recaptured, but also to those which are taken by the enemy, on board of the vessels of allies and of neutrals, and afterwards recaptured by us. I have also herein before shewn, that such was formerly the doctrine adopted by the states-general, and that they blamed the *French* for having followed a different principle.†

While the kingdom of *Portugal* was in the possession of the *Spaniards*, with whom we were at war, the states-general conquered a considerable part of the colony of *Brazil*, and several others of the *Portuguese* dominions in different parts of the world. After *Portugal* had recovered her independence, a truce of ten years was signed between that country and the states-general, in 1640.‡ But our government would not permit that the *Portuguese* should claim by virtue of the law of postliminy, any part of the dominions which once had belonged to them, and which we had taken from the *Spaniards*. In 1657, the truce being expired, but before any notice given of the renewal of hostilities, the *Portuguese* retook some of those places, and on the states-general complaining of it, they refused to restore them, but offered to pay a sum of money by way of compensation, which our government not being disposed to accept, they declared war against *Portugal*, on the 22d of *October* 1657. At last this controversy was settled by the treaty of peace which was made on the 6th of *August* 1661.

The *Portuguese* were undoubtedly in the right, to claim the dominions which the states-general had taken from them, be-

* C. 5.—† Above, p. 119.

‡ Shortly after the restoration of the house of *Braganza* to the throne of *Portugal*, the states-general made a treaty of alliance with that kingdom against *Spain*, notwithstanding which the two allies remained at war with each other, and although they united their forces against the common enemy, their mutual hostilities were only suspended by a truce of ten years, which was not very religiously observed. *Cerisier, Hist. Gen. des Prov. Un.* vol. vi. p. 148.—*Raynal, Hist. Philos. & Polit.* l. 9.

cause the states themselves asserted, that the kingdom of *Portugal* did not belong to *Spain*. In addition to this, the *Portuguese* had been in alliance with the states-general in the war against *Spain*, so that the places belonging to them which had come into the possession of the *Dutch*, their allies, were clearly to return to their former sovereign, by virtue of the law of postliminy. It is true, that at the very time when those places came into the power of the *Dutch*, there was no king of *Portugal*, but when afterwards, that country was restored to its independency, the *Portuguese* were entitled to resume the possession of the territories that had been conquered by their allies from the enemies, saving the claim of the states-general for the expenses which they had incurred in taking them.

CHAPTER XVII.

Of Pirates.

IT is a principle consonant to reason and sanctioned by the rules of positive law, that things taken by *pirates* or *robbers*, do not thereby undergo a change of property, nor require the operation of the law of *postliminy* to return to their former owners. The authority of the *Digest* is in point,* and I have shewn in a former chapter,† that this rule has been adopted by several nations in their treaties with each other. I need not, therefore, bring forward the additional authorities of *Grotius*,‡ *Gentilis*,§ and *Zouch*,|| and of a number of other writers. But I shall proceed to examine who are the persons to whom we may properly apply the denomination of *pirates* and *robbers*.

We call *pirates* and *plunderers*, (*pradones*) those, who, without the authorization of any sovereign, commit depredations by sea or land.¶ Hence, by the law of this country, they

* ff. De Capt. & Postlim. Revers. l. 19. § 2. Ibid. l. 24. 27.

† C. 15.

‡ De J. B. ac P. l. 3. c. 9. § 16.

§ De Jure Belli, l. 1. c. 4.

|| De Jure Fec. P. 2. § 8. Q. 15.

¶ Our author's definition seems to be intended to apply equally to *pirates* and *land-robbers*; whereas it might have been expected that he would have given one to be applied exclusively to the former description of men. We have not been able to find one in the books altogether satisfactory, that given by Mr. *Hawkins* seems deficient, inasmuch as it might possibly be applied to those who sail *with*, as well as to those who sail *without* a commission from a sovereign. He defines a pirate, "one who to enrich himself, either by surprise or open force, sets upon merchants or others, trading by sea, to spoil them of their goods and treasure." 1 *Hawk. P. C.* 267. Independent of the objection which we have made, there appears to be in this definition a great deal of unnecessary redundancy.

Were

are punished as pirates, who sail out for the purpose of making depredations on the enemy, without a commission from the admiral, and without having complied with the requisites of

Were we to presume to offer a definition of our own, we would say, that a pirate is "he, who sailing without being authorized by any sovereign to make captures, (or with commissions from different sovereigns at war with each other), commits depredations at sea or on shore." We say, "*or on shore*," because it appears to us, that on the principle of the celebrated case of *Lindo v. Rodney*, Doug. 591. (which, we think, may be extended thus far without straining its analogy), if the crew of an unlicensed cruiser should land on a defenceless coast, there commit depredations and carry off the booty on board of their ship, the act would be *piracy*; and to be tried in a court having admiralty jurisdiction. This doctrine (if correct) may find its application in case such pirates should be brought or found in a country different from that in which the depredations were committed. There, unless they could be tried as *pirates*, they could not be tried at all.

We mean to speak here of *piracy* by the *law of nations* only, not of that offence as it is considered at the *common law*. The definition above quoted from *Hawkins*, was clearly meant by him to apply merely to piracy by the law of nations, for, in the very next page he gives us the common law definition of the same crime, which is very different from the former one. "A pirate," says he, "*at the common law*, is a person who commits any of those acts of robbery and depredation on the high seas, which, if committed at land, would have amounted to felony." 1 *Hawk. P. C.* 268. On the same principle, the law of the *United States* defines piracy *in general*, the commission at sea, or in a river, haven, bason or bay, out of the jurisdiction of any particular state, of murder, robbery, or any other offence, which, *if committed within the body of a county*, would, by the law of the *United States*, be punishable with death. *Act of the 30th of April 1790. § 8.—1 Laws U. S.* 102. Several other offences are made *piracy* by the same statute, which come within the proper scope of municipal legislation.

Here, then, appear to be two different and distinct species of offences; one against the *general law of nations*, and the other against the *municipal law of the land*. The laws which constitute the latter kind of crime, are in some respects more *extensive*, and in others more *restricted* than that which defines the former. They are more *extensive*, in as much as they make *piracy* of an act of felony committed by an individual at sea, even on board of a commissioned vessel of his own nation, and more *restricted*, because they require, in order to constitute a piratical act, the commission at sea of a *common or statute law felony*, whereas the law of nations in its definitions of crimes, does not take notice of the technical rules of the common or any other municipal law.

An important question here occurs: "Whether an act of piracy, clearly considered as such by the law of nations, may be inquired of, and punished by the courts of *England* or the *United States* possessing admiralty jurisdiction in criminal cases, although it should not be *piracy* at the *common*

the law, on the subject of privateering. If an inhabitant of the *United Netherlands* should sail out under a commission from any foreign prince, or, without the consent of the states-general, should take a foreign commission in addition to one from our own government, he is to be punished by the forfeiture of life and goods, and of the security given on receiving his commission here.* By another law† it is decreed, that those who shall act thus are to be considered as *pirates*,‡ which is very reasonable, because they might thus commit depredations on the subjects of nations in amity with us, and involve their own sovereign into a war.§ Probably this last law was made on

law, nor be expressly provided for by statute? The learned *Wooddeson* is in favour of the affirmative. "Whether," says he, "a charge amounts to piracy or not, must still depend on the LAW OF NATIONS, except where, in the case of *British* subjects, express acts of parliament have declared, that the crimes therein specified shall be adjudged *piracy*, or shall be liable to the same mode of trial and degree of punishment." 1 *Wooddeson*. 140. T.

* Edicts of the 27th of *July* 1627, and 26th of *April* 1653.

† Edict of the 29th of *January* 1658.

‡ By the law of the *United States*, "any citizen accepting or exercising within the *American* territory, a commission from a foreign prince, shall be fined not exceeding two thousand dollars, and imprisoned not exceeding three years; and any person who, in the *United States*, shall fit or attempt to fit out or be concerned in a privateer, with intent to commit hostilities against a foreign state, with whom the *United States* are at peace, or shall deliver a (foreign) commission for any ship or vessel to be employed as aforesaid, shall be fined not exceeding five thousand dollars, imprisoned not exceeding three years, and the vessel with all her materials shall be forfeited." *Act of the 5th of June* 1794.—3 *Laws U. S.* 89. And by a subsequent act, "if any citizen of the *United States* shall, without the limits of the same, fit out or procure to be fitted out, or knowingly be concerned in the fitting out of a privateer for the purpose of cruising against the subjects of a nation in amity with us, or shall take the command, or serve on board of such privateer, or purchase any interest in her, he shall be adjudged guilty of a high misdemeanor, and be punished by a fine not exceeding ten thousand dollars, and imprisonment not exceeding ten years." *Act of the 4th of June* 1797.—4 *Laws U. S.* 3. T.

§ Sir *Leoline Jenkins* considers those who commit depredations under several commissions from different sovereigns, as pirates in the highest degree. "The law," says he, "distinguishes between a pirate who is a highwayman, and sets up for robbing, either having no commission at all, or else hath two or three, and a lawful man of war that exceeds his commis-

account of those who, in the month of *November* 1657, committed depredations under double commissions from *France* and *Portugal*,* of whom I have read in the newspapers of that time.

But what shall we say of those who make use of double passports or sea-letters, as is frequently done by masters of vessels, in order to carry on a contraband trade, or to commit other frauds with greater safety? They, indeed, are not equally guilty with pirates; yet, the states-general, by their edicts of the 31st of *December* 1657, have ordered the confiscation of their ships and goods. Certain sophistical lawyers† have pretended to argue, that such an act does no injury to us, if it is not done in fraud of *our own laws*; but this is a weak and silly argument, for it is important to the world at large,

sion. 2 *L. Jenk.* 714. There may be a difference, however, if the commissions are from sovereigns in alliance with each other; but although in such a case it might not amount to the crime of piracy, still it would be irregular and illegal, because the two belligerents might have adopted different rules of conduct with respect to neutrals, or may be separately bound by engagements unknown to the party. Regularly, no one ought to accept of a commission from a foreign prince, without the permission of his own sovereign.

On this subject, we know, that there have been various opinions. The chevalier de *Abreu*, (a *Spaniard*), in his *Treatise on Captures*, first published at *Cadix*, in 1756, and lately at *Paris*, in a *French* translation, in 1802—thinks, that there can be no inconvenience in taking several commissions from different sovereigns allied in the same war, because they all tend to the same end, the destruction of the common enemy. *Abreu*, part 2. c. 1. § 7.—but we cannot agree with him on this point, because we think, that it does not belong to an individual to judge of the relations that may exist between different sovereigns, and on his single responsibility to run the risk of involving his own country into a war. *Louis XIV.* in his *Ordonnance de la Marine* of 1681, expressly forbids his subjects and all persons residing in *France*, to take commissions from other sovereigns, without distinguishing whether his allies or not, under the penalty of being punished as pirates. *Ord. tit. des Prises*, art. 3. *Valin*, for various excellent reasons, thinks, that independent of positive law, the taking of several commissions even from allied sovereigns, cannot be justified, and strongly combats the opinion of the chevalier de *Abreu*. 2 *Val. Comment.* 236. T.

* *France* and the *United Netherlands* were at that time in alliance together against *Spain*, and the *United Netherlands* were engaged in a separate war against *Portugal*. T.

† *Consil. Belg.* vol. 4. Cons. 303.

that good faith should be preserved between sovereigns and their subjects, and that the latter should not be permitted to injure the former, by their fraudulent conduct.*

There are also others, who, although they are not properly called *pirates*, yet on account of the atrocity of their crimes, are punished as such. It is so with those hostile ships who come too near our shores, in violation of the prohibition of the sovereign. On the 24th of *February* 1696, the states-general issued an edict, by which it was enacted, "that all *French* privateers which should come close to the land, within the buoys, a fleet not being at hand to protect them, should be capitally punished, and this law was actually carried into execution, at *Groningen*, on the 14th of *March* of the same year. By what right such things are done, I have discussed in a former chapter.† Those also by our laws are punished as pirates, who commit frauds in matters of insurance,‡ and likewise those who cut the nets which are spread out for the herring fishery.§

Albericus Gentilis,|| and several other writers are of opinion, that those nations of *Africa*, whom we call *Barbarians*, are to be considered as pirates, and that captures made by them, work no change of property; but that opinion cannot be defended on any rational principle. The *Algerines*, *Tripolitans*, *Tunisians*, and those of *Salce*, are not pirates, but regularly organized societies, who have a fixed territory and an estab-

* In *England* and in the *United States*, the rule is, that the courts take no notice of the revenue laws of other countries; and therefore, insurances made on goods or voyages prohibited abroad are supported when not contrary to the stipulations of the parties. *Planché v. Fletcher*, Dougl. 238. This principle, however, has been much contested by writers on both sides of the question; of which controversy see an account in *Park* on *Insur.* 341. 6th edit. T.

† Above, c. 3. p. 19.

‡ Edict of *Philip* the 2d on Insurance, of the 26th of *January* 1550. § 22. We have not been able to ascertain the precise extent of this law. It is not mentioned in the *Curia Philippica*, nor inserted with the other maritime ordinances of the same sovereign, in *Les Us & Coutumes de la Mer*, nor in *Adriaan Verwer's* collection of *Spanish* and *Dutch* maritime laws, entitled "*Over de Zee-Rechten*." T.

§ Edict of *Philip* the 2d. of the 9th of *March* 1580. § 23.

|| De Advoc. Hispan. l. 1. c. 15.

lished government, with whom we are now at peace and now at war, as with other nations, and who, therefore, are entitled to the same rights as other independent states. The sovereigns of *Europe* often enter into treaties with them, and the states-general have done it in several instances.* *Cicero* defines a regular enemy "one who hath a commonwealth, a court of justice, a treasury, the consent and agreement of the citizens, and who pays some regard to treaties of peace and alliance.† All these things are to be found among the *Barbarians* of *Africa*, for they pay the same regard to treaties of peace and alliance that other nations do, who generally attend more to their convenience than to their engagements. And if they should not observe the faith of treaties with the most scrupulous respect, it cannot be well required of them; for, it would be required in vain of other sovereigns. Nay, if they should even act with more injustice than other nations do, they should not on that account, as *Huberus*‡ very properly observes, lose the rights and privileges of sovereign states.

Indeed, as the *Algerines* constitute a republic, ambassadors are sent to them by other princes, and those who are made prisoners by them, change their condition and become slaves.§ Perhaps the *Spaniards* do not reckon those *Barbarians* among the number of regular enemies; but, although it may be correct, as to them, the principle will not bear to be extended beyond *Spain*. The *Dutch*, it is true, are in the habit of carrying their *Algerine* prisoners into *Spain*, and there by the *lex talionis*, to sell them into slavery, but this is conformable to the law of war, which may be carried into execution against

* Particularly on the 30th of *April* 1679, and 1st of *May* 1680, and often afterwards.

† *Qui haberet Rempublicam, curiam, ararium, consensum & concordiam civium, rationem aliquam, si res ita tulisset, pacis & fœderis.* Cic. *Philip.* 4. C. 14.

‡ *De Jure Civitat.* l. 3. c. 5. § 4. n. ult.

§ Hence, those who are taken by the *Algerines* are not only privately, but sometimes publicly, redeemed. The states-general, on the 25th of *September* 1681, ordained, that the bailiffs of towns should report to the magistrates those of their inhabitants who should be taken by the *Algerines*, and that the magistrates should report to the counsellors of the states of *Holland*, that they might take measures to effect the redemption of the captives.

an enemy, if one thinks proper, under such circumstances as I have above discussed in the third chapter.

There has been a case, however, in which those *Africans* have been considered to a certain degree as pirates, so far, at least, that their capture was not thought to have worked any change of property. On the 18th of July 1664, the admiralty of *Amsterdam* restored, without salvage, a vessel which the *Algerines* had taken from the *English*, and which the *Dutch* admiral had recaptured from the *Algerines*, and the said vessel was so restored, as *Aitzema* relates,* at the request of the *English* ambassador, in hopes that the *English* would do the same by us in similar cases. But lest this case should be drawn into a precedent, it ought to be known, that the *Algerines* had taken that vessel in the midst of a peace which had been lately concluded by them with the *English* and *Dutch*, and for that reason alone it had been considered that their capture under such circumstances, had worked no change of property. Such, according to *Aitzema*, was the reason given by the *English* ambassador; whether it was sufficient or not, I shall not now consider, being satisfied with observing, that this ought to be, and in fact it was considered by both parties at the time, as a singular case.

What is the proper *forum* or jurisdiction for the trial of pirates may be and has often been questioned?† If such a one, although a foreigner, should commit depredations upon our citizens,‡ and be taken, I have no doubt but that he may

* Aitz. l. 44.

† In the original, there is in this place, a long dissertation on the subject of the respective jurisdictions of the *Dutch* admiralty courts and their ordinary tribunals, which we have left out, as uninteresting and useless.

T.

‡ As the law of nations is at present understood, it is of no importance, for the purpose of giving jurisdiction, on whom or where the piratical offence has been committed. A pirate is considered as an enemy of the human race, (*hostis humani generis*;) and therefore, may be tried, convicted and punished in any country where he may be found. "Every man," says sir *Leoline Jenkins*, "by the usage of our *European* nations, is justiciable in the place where the crime is committed; so are pirates: being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they may be taken. 2 *L. Jenk.* 714.

T.

properly be tried and punished by our own tribunals, not only if he is taken in the fact and brought into our country, but also if he should be found and taken among us on any other occasion. This must be admitted, if he has committed depredations upon us without any commission from his sovereign, but if he had a commission, and it is only alleged that he exceeded it, then the question becomes more susceptible of doubt.

In the year 1667, this subject was agitated between the *English** and the states-general, concerning those who had obtained letters of reprisal while there were differences sub-

* The *English*, however, a few years afterwards, unjustly, in our opinion, claimed and exercised the right of trying and punishing a regularly commissioned privateer for having exceeded the bounds of his commission. The case is related by sir *Leoline Jenkins*, whose advice was taken and followed on the occasion. In the year 1675, one *Cheline*, the commander of a *French* privateer, having committed several unwarrantable depredations at sea, and among other things, plundered several *English* vessels of their provisions, (*England* being at that time in amity with *France*), went with his ship into the port of *Kinsale*, in *Ireland*, where his crew having informed against him, sir *Leoline Jenkins* was consulted by the king on his case, and gave it as his opinion, that he was liable to be punished with death as a pirate, and that his goods and vessel should be confiscated. *Cheline*, however, having had wind of the intended prosecution, escaped from *Ireland*, but his vessel and goods were seized, proceeded against in the court of admiralty and confiscated. In vain the king of *France*, whose commission he bore, demanded that the cause should be remitted to him for trial; sir *Leoline* answered, that this matter of *renvoy* (remitting of causes to foreign sovereigns for trial) was quite disused among princes; and as to *Cheline's* commission, he said, that it had only been given to him to cruise against the enemies of the most christian king, and did not give him the right of pillaging the king's friends. 2 *L. Jenk.* 714. 754.—Mr. *Wooddeson* is mistaken, when he says, that *Cheline* was held not to be punishable for piracy, because he had a commission from the king of *France*. 2 *Wooddes.* 425. He was actually punished as a pirate as far as the confiscation of his ship and goods, and if his person had been laid hold of, would have been hanged as such, for plundering the *English* vessels at sea. It is true, that among the charges exhibited against him, there was one for attacking and taking a *Dutch* ship, near the port of *Dublin*, and that on this particular charge, sir *L. Jenkins* gave it as his opinion, that he could not be capitally convicted; but it was not on the ground of his being bearer of a *French* commission, but because the statute had provided a different punishment. 2 *L. Jenk.* 754.

T.

sisting between the two nations, and who committed depredations even after the peace. The *English* contended, that they were to be tried by the courts of the sovereign who had granted the letters of reprisal. The ambassadors of the states-general insisted, that those who committed hostilities without a lawful authority from their sovereign, were to be considered as pirates, that such was the general law of nations, and that offenders of that description might be punished by any sovereign into whose dominions they might be brought, of which there was a great number of examples. The *French* ambassadors at that time were of the same opinion in which the *English* and the states-general then concurred.*

But whether one be a pirate or not, depends upon the fact, whether he has or not, a commission to cruise; and if it should be alleged that he exceeded the authority which that commission gave him, I would not, on that account, hold him to be a pirate. Generally, the sovereigns who grant the commissions, decide on the captures that are made by virtue thereof, because the prizes are brought within their dominions;† but I would have no objection to such decision being made by the sovereign whose subjects complain of depredation, if the perpetrators should be brought or apprehended within his territory.‡ By

* Aitz. l. 47.

† Professor *Rutherford*, in his *Institutes of Natural Law*, gives a different reason for allowing to the sovereign of the captors, the exclusive right of adjudicating prizes made under his authority. "It is not," says he, "because the prize has been brought into the territory of that sovereign, that he is entitled to an exclusive jurisdiction in such cases; for, the controversy arose upon the main ocean, which is out of his territory, and as he had no jurisdiction in the first instance, the subsequent act of bringing the prize into his territory will not give him any. But the reason is, that the state to which the captors belong has a right to inspect into their behaviour; both because they are members of it, and because it is answerable to all other states for what they do in war." 2 *Ruth.* 595, 596. *Cambridge edit.*

T.

‡ Several plausible schemes have been proposed for establishing a more impartial jurisdiction for the trial of neutral property taken in war, but none of them has yet obtained the general assent of mankind, or has even been adopted by a single nation. *Hubner* is for a mixed tribunal, to consist of commissioners respectively appointed by the sovereigns of the captors and the captured, with the addition, when the prize is carried into a neutral port, of one or more judges appointed by the sovereign of the neutral ter-

the 22d article of the treaty of peace between the king of *France* and the states-general, of the 27th of *April* 1662, it is stipulated, "that vessels which shall be taken by ships of war or commissioned privateers, shall be tried in the dominions of the sovereign by whom the commission shall have been granted, and not elsewhere."

It is more difficult to decide, whether a foreigner who has committed depredations on other foreigners, may, if he should be found among us, be tried by our tribunals? In the year 1661, doubts were entertained upon this subject, in the case of a *Portuguese* privateer who had committed depredations on the subjects of a nation in amity with us and not at war with *Portugal*, but the spoliator having died in the meanwhile, nothing was decided upon it.* In the year 1662, the king of *England*, on the representation of the ambassadors of the states-general, ordered an *Ostend* ship, cruising under a com-

ritory. 2 *Hubb.* 44.—*Galiani* is for vesting that jurisdiction, in some cases, in the tribunals of the captor, and in others in those of the captured. *De' doveri*, U. c. l. 1. c. 9. § 8, but the ancient practice has continued and still continues to be followed.

It is true, however, that when prizes are brought into a neutral port, the neutral sovereign will restore the property of its subjects or citizens, if it has been illegally captured. That this doctrine is not new, appears clearly from the 15th article of the marine ordinance of *Louis* the XIV. title *des Prizes*, which contains this express clause: "If on board of the prizes which shall be brought into our ports by foreign armed vessels, there shall be found goods belonging to our subjects or allies, those of our subjects shall be restored to them," and this right, says *Valin*, "is exercised by way of compensation for the asylum, granted to the captor and his prize." 2 *Valin's Comment.* 276.

The same right has been exercised by the courts of the *United States*, in various instances, during the last war between *Great-Britain* and *France*. *Glass & Gibbs v. The Betsey.* 2 *Dallas's Reports* 6.—*Hollingsworth v. The Betsey.* 2 *Peters's Admiralty Reports*, 330.

In like manner, prizes taken by foreign privateers fitted out in the *United States*, in violation of our neutrality, and brought into our ports, have been invariably restored. *Talbot v. Jansen.* 2 *Dallas*, 133. and by an act of congress of the 5th of *June* 1794, the district courts are authorized "to take cognizance of complaints, by whomsoever instituted, in case of captures made within the waters of the *United States*, or within a marine league of the coasts or shores thereof." 3 *Laws U. S.* 91. T.

* *Aitz.* l. 41.

mission from the king of *Spain*, which had taken a *Dutch* vessel, to be detained, and the laws to be executed upon the captain.*

It is clear, that if the law of the neutral country (like the two edicts which I have mentioned above)† forbid the selling of prizes on the neutral territory, unless they have been carried into the port where the privateer was fitted out, and there legally condemned, it will appear unjust to give an action against the captor, either to the government for the punishment of the offence, or to the owners of the captured property for the damage suffered. The condition of both foreigners ought to be alike; if the spoliated party is permitted to bring his action against the captor, the latter ought to be allowed to justify himself, by shewing that his prize was legally captured. And yet, it would be hard and unexampled, to deny to the owner of the captured ship and goods, the right of claiming satisfaction from a foreigner whom he finds here, and who may be immediately going nobody knows whither. For this reason, I am not satisfied with the two edicts above mentioned.

* The fact, as related by *Aitzema*, (l. 48.) is as follows: The *Dutch* ambassadors complained to his majesty of the intolerable insolence of the *Ostend* privateers, and expressed their opinion of the manner in which it should be proceeded against them; they spoke in particular of the ship *Jupiter* of *Amsterdam*, which those corsairs had shot at for a long time, (making them believe that they were *Turks*), and had frightened them so much, that the crew of the *Jupiter* had forsaken her, and made their escape to the shore, and the privateer had run in with the ship into the *Isle of Wight*.

The king was pleased to answer, that he had heard great complaints on all sides of the conduct of the *Ostend* privateers; that they were, in fact, mere pirates, but that he would put a stop to it; that if any of his subjects should be found on board of such privateers, they should be hanged, and that he would make strong representations to the court of *Brussels*, that they should inflict the severest penalties upon such robbers; that with regard to the ship *Jupiter*, the ambassadors should present a memorial to the council of state, who would take order upon the subject. "The memorial," continues *Aitzema*, "was accordingly presented, on which his majesty was pleased to resolve, that the captain of the privateer and his ship should be arrested, and proceeded against according to law." 6 *Aitz.* 395; fol. edit. What was afterwards done with them, does not appear. T.

† C. 15. p. 121.

wards (as *B* alleged) the two captains agreed together, that any future prize that they should make, should be divided between them. Afterwards they separated, and *A*'s vessel alone took another prize, which *B* insisted should be divided between them, by virtue of their agreement. *A* denied that the agreement extended to prizes separately made, and if it did, he contended, that it was illegal and void. And so it was determined by the inferior court at *Flushing*. But *B* having appealed to the supreme court, the cause was decided in his favour, on the 3d of *March* 1696, and that judgment was affirmed by the court of review on the 4th of *October* 1697. To the same effect is the opinion of several advocates in *Consilia Belgica*,* and a similar decision was given by the court of admiralty of *Amsterdam*, in 1665.

But all these decisions, except that of the court of *Flushing*, appear to me to have been erroneous, and I think that the cause ought to have been determined in favour of *A*. I have read with astonishment in the acts of the supreme court, in which the opinions of several judges of that tribunal and of the court of review are inserted, that in the particular case that I have spoken of, the only question that was agitated was, whether there had actually been an agreement between the two captains, that the prizes which they should separately take should be common between them, or whether it contemplated merely those which they should take in company; but the question of the legality of the agreement, which was the first that suggested itself to me, does not appear to have been even thought of.

Admitting that it had been expressly agreed between the two captains, that all the prizes which they or either of them should take, whether jointly or separately, should be equally or proportionably divided between them, still I do not think that *A* was at all bound by that agreement. He had sent out his vessel at his own risk, for the sole purpose of cruising and making captures; he had given no other instructions to his captain, and had in no manner authorized him to

* Vol. 4. Consil 204.

enter into partnership with others, which he might have done himself, if he had thought proper. His captain, therefore, had no authority for what he did, and in that case, his unauthorized act could not bind his owner. I know, that if *B*'s vessel had alone made a prize, it would not have been difficult to persuade *A* to receive his proportion of it; but neither would it have been difficult to persuade *B* to contend for the same principle, which *A* in the case before us, insisted upon. The first vessel which was taken by the two armed ships together, and by means of their joint force, was a prize common to them both, by an implied partnership arising out of the circumstances of the case; but it was not so with the second, which *A*'s vessel took alone, and which he ought to have kept exclusively to himself, if, agreeably to my opinion, he was not bound by the agreement of his captain. Therefore, on legal principles, setting aside the question of fact, I prefer the decision of the court of *Flushing* to all the others that have been given on the same subject.

I proceed to a question, which, in my opinion, deserves the most serious consideration; it is, "Whether, if one or more armed ships take a prize, others being *present*, but not fighting, it is to be divided between them?" As far as relates to ships of war, this question is settled by positive law; for, there is a decree of the states-general, of the 28th of *January* 1631, by which it is enacted, "That if a ship of war shall attack an enemy, another ship of war being present, may join in the fight, but not if the one who attacked first, shall call out that he has no need of assistance." But it appears to me, that this law was made *specially* for vessels of war, otherwise, there is nothing to hinder one armed vessel from joining another, in attacking and capturing a common enemy who is not yet subdued.

For the same reason I consider as a special ordinance, the sixth section of the *Forma* or regulation of the 15th of *July* 1633, expressly made for the privateers commissioned to cruise against the *Spaniards* in *America*, by which it was ordered, "that a privateer who should take a prize jointly with a vessel of the *West-India Company*, should not be en-

titled to a share thereof, unless he had been expressly called to the assistance of the company's ship." The same may be said of the seventh section, which enjoins upon all privateers, on pain of forfeiture of ship and goods, "not to meddle or interfere with the captures which the ships of the company may wish to make." If, however, the aid of a privateer ship should be called for, and she should take a prize, jointly with a vessel of the *West-India Company*, there is no doubt but that it should be distributed between them, in proportion to their respective size and force, as is provided by the sixth section of the said *Forma*: and if their force is equal, then the prize is to be equally divided between them; otherwise, it is best to observe what is called a *geometrical proportion*.

What shall we say, if one or more ships pursue an enemy's vessel, and one of them perishes? or if more, perhaps, are present, but one alone takes the prize, while the others are merely spectators, and take no part in the action? The decree of the 28th of *January* 1631, which I have mentioned above, directs, that in such a case, "the prize is to be divided between all the *vessels of war* which have pursued her, but that she which has actually made the capture is to have the provisions, small-arms and *phunderage*."* But this again only concerns *ships of war*, of whose captures the states-general dispose at their discretion; for otherwise, if the case concerned privateers only, I would rather adjudge the whole prize to him who has fought and conquered the enemy's vessel, how many others soever might have pursued her, or been spectators of the contest.†

* The precise expression used in the original: it probably means every thing susceptible of being made booty of war, which is not a part of the vessel or of her cargo, (properly so called.) T.

† This opinion of our author accords with that of the modern writers who have treated of this particular subject. "Excepting," says professor *Martens*, "the case of an association among privateers, it is requisite, in order to have a share in the prize, to prove the having contributed in some manner to the taking of it, and it is not sufficient to have been found in sight. *Martens on Captures*, § 32. in fin. p. 91. *Engl. transl.* It appears also to be, as far as we know, generally carried into practice among the nations

There are those, I know, who are for admitting all who were merely present, or even in sight, though at a distance; but this cannot be admitted. It is true, that the mere presence

of *Europe*, with respect to privateers, though in the case of vessels of war, governments have been induced, from motives of policy, to adopt a different rule.

The ordinances of *France* provide, that with regard to vessels of war, "those shall be considered as *joint captors* who shall have found themselves together and in sight of the capture at the time of its being made. Ord. of the 15th of June 1757, art. 10. 1 *Code des Prises*, (edit. 1784) p. 512. —*Valin, Traité des Prises, Append.* 199. Thus, the mere circumstance of being in sight at the time of the capture, entitles a *ship of war*, by virtue of this ordinance, to a share of the prize.

But, in the case of privateers, another ordinance prescribes the opposite rule. It enacts, "that none shall be entitled to a share in a prize taken from the enemy, who have not contributed to the taking of the vessel;" which the next article explains, can only be done "by fighting, or by making such an effort as may have compelled the enemy to surrender, by intimidating him or cutting off his retreat." Ord. of the 27th January 1706, art. 1 and 2. 1 *Code des Prises*, 282. (same edition.)—*Valin, ubi supra*, p. 102.

In *England*, the same distinction appears to be adopted. *Ships of war* are entitled to share in a prize from the mere circumstance of having been in sight at the time of the capture, the ancient general rule having been relaxed or modified in their favour. "Formerly," says sir *William Scott*, "joint capture was confined to cases of actual co-operation, and when, in consequence of frequent litigations, it was extended to constructive assistance, for the purpose of preserving harmony and good understanding among the navy, the being in sight became the principal criterion. *The Vryheid*, 2 Rob. 14. Am. edit.—In a later case, the same judge determined, in a contest between a king's ship and a privateer, that the mere being in sight was sufficient in the former to support the *animus capiendi*, and entitle her to a share of the prize. *The Flore*, 5 Rob. 239. Am. edit.

But, on the contrary, when a similar controversy arose between similar parties, and the privateer claimed a share of the king's ship's prize, because he had been present at the capture, sir *William Scott* decided, "that the mere being in sight was not sufficient, with respect to privateers, to raise the presumption of co-operation in the capture: they clothe themselves, said he, with commissions of war from views of private advantage only; they are not bound to put their commissions in use on every discovery of an enemy, and therefore, the law does not presume in their favour, from the mere circumstance of being in sight, that they were there with a design of contributing assistance and engaging in the contest." *L'Amitié*, 6 Rob. 264. Am. edit.

We have not been able to find a single case in any of Dr. *Robinson's Reports*, in which the naked question has been agitated exclusively

of others may have been the cause that the enemy has either surrendered sooner or been more easily subdued; but we are not to consider for what reason the vessel was taken or surrendered, but who took her. In the same manner, we should not admit the fort,* town or fleet in whose presence a capture was made, to a participation in the prize, even though it might be said to have been induced to surrender, by the fear which their presence excited. On the other hand, it is clear, that if another vessel has joined the captor in fighting the enemy, an accidental partnership must be considered as having taken place between them, and the reason of the thing requires, that what has been taken by their joint efforts, should be divided among them in proportion to their respective strength. Nor are we to discriminate in such a case between the different degrees of exertion; for that would be too difficult in practice; but we only consider whether the vessel which was present at the capture, did actually fight, and by her assistance, contribute to the victory.

Analogous to this principle is the doctrine which the civil law lays down on the subject of animals *feræ naturæ*, which do not become the property of those who pursue, but of those who actually take them.†

✍ *The remainder of this chapter is so entirely and exclusively local, that we have not thought it worth while to translate it.*

between *privateers*. In one case, indeed, a share in a prize was allowed to one of that description in competition with another, from the circumstance of his being *in sight* at the time of the capture, coupled with that of having *quiled in company* with the principal captor, and the capture was that of a defenceless neutral vessel, in which no fighting was required: *The William & Mary*, 4 Rob. 312. *Am. edit.* But we have not discovered one in which the question turned *singly* on the circumstance of being *in sight*, at the time of the capture; therefore, we presume, that the principles established in *L'Amitié*, would prevail in such a case. T.

* In *England*, land forces are not considered as entitled to share in a capture, unless they have actually assisted and co-operated in it. *The Dordrecht*, 2 Rob. 53. *Am. edit.* T.

† *Inst. De Rer. Divin.* § 13.

CHAPTER XIX.

Of the Responsibility of owners of Privateers.

BY the laws of our country, contained in the *Formæ Admiralitatum* and several edicts of the states-general, privateers are not permitted to sail from our ports, without giving security to answer for their good behaviour, that they will do no injury to neutrals, and that they will bring their prizes to legal adjudication, by the court of admiralty of the place where the security is given.*

The amount of this security has varied. It was at first required to be in ten thousand florins, the ship and the cargo at the same time remaining answerable for the consequences of the privateer's unlawful conduct. Afterwards it was ordered, that the owner should give security in twelve thousand, and the captain in ten thousand florins, the owner's bond to be resorted to in the first instance, and if it should not prove sufficient, then recourse might be had to that given by the captain.† But by the last edict which has been made upon this subject,‡ it is merely provided, that security shall be given in the sum of *thirty thousand florins*,§ and the law does not

* *Formæ Admiral.* of the 13th of August 1597. §§ 5. 69.—of the 15th of July 1634. § 5.

† Edicts of the 1st of April 1622.—9th of August 1624, and 22d of October 1627.

‡ *Formæ* of 28th of July 1765. § 3.

§ About £12,000.—In *England*, the security given by a privateer is £ 3000 (£13,320) which is reduced to one half if the vessel carries less than 150 men. *Horne's Compendium of Admiralty Laws*, p. 9.—In *France*, by a decree of the 2d *Prairial*, 11th year, (22d of May 1803), the amount of such security is fixed at 74,000 francs (about \$14,095) reduced in the same manner to one half, if the privateer is navigated by less than 150 men. *Dict. Univ. de Commerce*, verbo *Cours.* By an act of congress, made during the partial hostilities between the *United States* and *France*, priva-

specify, whether by the captain or by the owners. It appears to me, however, that the captain is the person who is to give the security, because it is he who is to bring the prize into the port from whence the vessel has sailed. I might mention here several treaties between the states-general and other powers, by which it has been stipulated, that captains and owners of privateers should give security not to do any thing in violation of existing treaties, but as they do not enter into further details, I think that I may safely pass them over.

Thus much being premised, I shall proceed to inquire, whether, if a privateer has made an illegal capture, the damage suffered in consequence thereof is to be repaired by the captain, his securities, or the owners of the capturing vessel, and if to the latter, then to what extent they are liable? On this question, the *Dutch* lawyers have answered,* "that if the captain of a privateer ship has wrongfully taken a neutral vessel, and she should be lost in consequence of his having put an ignorant prizemaster on board of her, the party injured may sue, at his pleasure, the owner of the privateer, the captain, his securities and every one of them, until he recovers the whole amount of the damage, even though it should by far exceed the value of the vessel that made the capture." Let us now consider this subject in detail.

A doubt cannot be entertained of the liability of the *captain* to the whole extent of the damage suffered in consequence of his unlawful capture. He was employed for the purpose of capturing enemies, not neutrals; if, therefore, he has made prize of the latter, he has exceeded his authority, and is consequently liable for all the damage which the neutral has suffered. This principle is clearly sanctioned by the edict of the states-general, of the 1st of *April* 1622; for, after

teers were directed to give security in \$14,000, if the vessel carried more than 150 men, and in half that sum if she carried less. *Act of the 9th of July* 1798, § 4.—4 *Laws U. S.* 165.

In *Spain*, however, according to their prize ordinances of 1779 and 1796, (we have not seen that which was probably made at the beginning of the present war), security is only required from all privateers, without distinction, in 3000 rials de vellon, equal to \$1500.

T.

* *Consil. Belg.* vol. 4. *Consil* 205.

directing that security shall be given by the captains of privateers, in the sum of ten thousand florins, that they shall bring their prizes into the port from which they shall have sailed, the law proceeds and says: "reserving, nevertheless, to those who shall have suffered damage by any unlawful act committed by the captain beyond the extent of his commission, their personal action against the said captain and others who shall have occasioned the said damage."

As to the *securities*, the advocates who subscribed the opinion above mentioned, appear to me to have been mistaken; for, those securities cannot, I think, be made responsible for the whole damage suffered, unless they have bound themselves to that extent; but if they have merely stipulated in a certain fixed sum, as is usual in such cases, they cannot be made liable beyond its amount, nor can they be called upon to answer for any other acts than those for which they have expressly made themselves responsible; as for instance, if they have become bound for the carrying of the prizes into a particular port, and the prizes have been actually carried thither, I conceive that they are discharged, and that it is nothing to them, whether the captures have been lawfully or unlawfully made, unless they have bound themselves for that likewise. But because captains of privateers are in general so poor, that they are not able to make good the damage which they have occasioned, and because the securities are not in general bound beyond a certain sum, which, after being compelled to pay, they may recover back by an action against the owners, it is upon the *owners* that the whole burthen falls in the end. Let us, therefore, as to them, inquire in the first place, whether they are liable for the whole of the damage suffered, or whether, as in the *actio de pauperie* and *actio noxalis*,* they are

* The first of these actions was given by the *Roman* law against the owner of a quadruped, which had done an injury to some person, by kicking, biting, &c. which was called *pauperiem facere*. See on this subject, the title of the *Digest*, *si quadrupes pauperiem fecisse dicatur*. Dig. l. 9. tit. 1.

The *actio noxalis* lay against the master of a slave for a theft or other injury done or committed by him. Dig. l. 9. tit. 4. *De noxalibus actionibus*.

In both these cases, the owner or master was discharged by delivering up the quadruped or the slave.

only bound to the amount of the value of the privateer and her appurtenances?

A question of this kind was formerly brought before the supreme court of *Holland*. Five *Dutch* privateers had unlawfully taken a *Venetian* ship. The owners of the captured vessel at first instituted a suit against the captains of the privateers, and obtained a judgment, by which they were condemned to restore the vessel only, without damages. But as the sentence was not complied with, they then brought an action against the five owners, contending, that they should jointly and severally be condemned not only to restore the vessel, but also to pay damages. The court, by their decree of the 31st of *July* 1603, condemned the owners jointly and severally, to restore the vessel and her cargo, and if that could not be done, then to pay their appraised value; but the sentence contained an express clause, that execution of it should be made only on the five ships which had made the capture, and that the owners should not be bound beyond their proceeds.

On the strength of this precedent, respectable lawyers have given their opinion to the same effect,* but I cannot concur with them, because I think, that when the owners of a privateer ship put a captain on board of her to make captures, they are bound for the whole of the damage that he may occasion. The master who captures, in consequence of an authority that he has received, is appointed for that particular purpose, and he who appointed him, is by that alone, responsible for every thing, good or bad, that he may do in the execution of his trust. Thus we give the *actio institoria*† against the proprietor of an inn, who has appointed an innkeeper; if the innkeeper makes any contract, we do not distinguish in what manner or with what intent he did it; and thus also we give the *actio exercitoria*‡ against the owner of a vessel for the act of the

* Consil. *Holland*. vol. 3. Consil 221.

† See the Digest, l. 14. tit. 3. *De institoria actione*.

‡ Dig. l. 14. tit. 1. *De exercitoria actione*. This title will be found translated into *English*, in the *American Law Journal*, vol. ii. p. 462. T.

master, provided the latter acted in the course of his employment as such; if otherwise, the owner is not bound, as *Ulpian* fully demonstrates.* The appointment is the sole cause why the proprietor of the inn and the owner of the vessel are responsible, if what has been done belonged to the business for which the authority was given, and not to some other one, different from it. He who appointed the captain of a privateer must have known, that his business was to make captures, and that if he should execute it improperly, it would be imputed to the owner for having appointed a dishonest or an unskilful captain. If the master having borrowed money for the repairs of his vessel, applies it to his own use, *Ofilius* tells us very properly, "that the owner is liable and must impute it to himself that he employed such a person."† Wherewith agrees, what the states-general say at the close of their decree of the 22d of October 1627, "*that the owners must take care that they employ proper captains.*"

If the proprietor of an inn is liable for the acts of the inn-keeper, and the owner of the vessel for those of the master, it clearly follows, that they are so to the amount of their whole property, and that they are not discharged by delivering up the inn or the vessel. I do not remember to have seen this doctrine contradicted any where, nor could it be contradicted with any appearance of reason, for nothing is clearer, than that those who are responsible for the acts of others are so to the whole extent of the damage which they may occasion, and therefore the owners of a privateer are bound to make good *in toto*, the damage suffered by the illegal spoliations of their captain.

The laws which I have already mentioned, afford strong arguments in favour of this principle. The owners of privateer ships are bound to give security, formerly in twelve thousand, now in thirty thousand florins, that no injury shall be done to an ally or neutral. Now, if they are not personally bound to a farther extent than the value of the vessel, why is

* ff. de exercit. act. l. 1. §. 12.

† Ibid, § 9.

a specific sum required which may, in many instances, greatly exceed that value? If the law had meant that the value of the ship should fix the extent of their responsibility, it should have directed her to be valued, and ordered security to be taken in the precise amount of the valuation. A still stronger argument may be drawn from the *Forma* of the 28th of July 1705; for, by that law the owners themselves are declared to be liable for the damage which may be suffered by the wrongful acts of the privateer ship, and every thing belonging to her equipment is made subject to a special lien or tacit hypothecation to answer for that damage. Away, then, with the doctrines which are drawn from the *Roman* laws, on the subject of the *actio de pauperie* and *actio noxalis*. These do not apply to the present question, and are founded on quite different principles.

We must therefore conclude, that the supreme court, in the case above mentioned, gave an erroneous sentence; for, if the owners of the privateer ships had appointed the captains who took the *Venetian* vessels, and had authorized them to make captures, they were bound for the whole, in the same manner as they would have been if they had appointed those captains for mercantile purposes, and had given them authority to make commercial contracts. Perhaps, however, it will be said, that the report does not expressly state, that those five vessels were *privateers*; but if they were not such, it cannot be said, that the owners gave authority to their captains to make captures, and in that case, I would wish to know, why the court condemned the owners to the restitution of the *Venetian* ship and cargo, and awarded execution even against the vessels of those owners, and thus condemned them for an act which was not within the authority committed to their captains, which is evidently contrary to the most familiar principles of law. In such a case, therefore, the owners of a vessel cannot be made in any manner liable; for they, indeed, have put the master in their place and stead, but merely as to the business which they have ordered him to transact, and if in the course of that business, the master had committed a

fault, or has been guilty of fraud, they are bound to answer for him, otherwise not. If I give to a carpenter a vessel to repair, and he gives it to his apprentice, who, with one of his master's own tools, happens to kill somebody, the master will not be at all answerable for it. Therefore, the action against owners of ships cannot be assimilated to the action *de pauperie*, except so far as it makes the owner of a horse or mule liable, if by the fault of his driver, the animal has done some damage, but the analogy of that law does not reach farther.

Agreeably to the doctrines which I have contended for, owners of vessels will clearly not be liable, if they have not appointed the master for the purpose of making captures, otherwise they will be responsible, not merely to the amount of the value of their vessels, but to that of their stipulations, which formerly were of 12,000 and now are of 30,000 florins. In addition to that, those who have suffered the damage, may, by virtue of the decree of the 22d of *October* 1627, sue the security of 10,000 florins, which the captain is obliged to give, that he will bring his prizes into the port from whence he sailed, for so the decree expressly provides. I think, however, that such a demand would be unjust, unless it had been made known to the securities, at the time of their entering into the stipulation, that they would be exposed to that liability, and had agreed to it; for if they had simply engaged, as is almost always the case, that the captain should return with his prizes to the port from whence he sailed, I cannot express how unjust it appears to me, to make them liable on that security for any other cause; as I have already hinted, when speaking on the subject of securities.* But if all that I have mentioned is not sufficient to repair the damage, what shall we say in such a case? Are the owners to be held further? I think that they are, until they shall have made good the whole damage; for, it is clear, that a pledge or security does not liberate a debtor, unless it is fully sufficient to discharge the debt.†

* Above, p. 149.

† ff. de Distract. Pign. l. 9. § 1.

Moreover, if the vessel, which we are speaking of, be not a privateer, that is to say, if she has no commission, but nevertheless makes captures by order of the owners, I think that the same thing is to be said as if she really were a privateer; for, the right arises out of the authority and the appointment, and it is nothing to those who have suffered the damage, whether they are injured by a real privateer or by a vessel not provided with a commission.

CHAPTER XX.

Of Captures made by vessels not commissioned.

IT is properly made a subject of inquiry, whether, if a ship not commissioned to make captures is attacked by an enemy, and in her defence, or from some other justifiable cause, takes an enemy's vessel, to whom in such case the prize is to belong? Three contending parties appear, who seem to have an equal claim to it, and in favour of each of whom many ingenious arguments may be adduced; they are the *owner of the ship*, the *captain and mariners*, and the *shipper* who may have taken her to freight.

On behalf of the *owner of the ship*, it may be said, that he is entitled to the prize, because it was taken with his own ship and guns, and because the captain and men who effected the capture were in his employ, and bound to labour for his benefit; it ought not to be given to the captain nor to the mariners, because they are not entitled in law to any thing besides their wages, nor to the freighter, because he only hired the vessel for the transportation of his merchandize, and for nothing else.

The *master and mariners*, however, may plead that the capture was achieved by their prowess and with the danger of their lives, and therefore, that they are justly entitled to the benefit resulting from it: that with respect to the owner of the ship and the freighter, they cannot in justice claim the prize, because they had not hired him to make captures, and the contract which they had made together, was for purposes of a quite different nature.

And lastly, on the part of the *freighter*, it may be argued, that he had hired the ship, the guns, the master, the mariners, and the right to their labour, not only for the transportation

of his merchandize, but also for the defence of the ship for the sake of the goods that it contained, which defence is to be taken with every thing incident to it, and involves the right not merely of repelling, but even of capturing the enemy, to prevent his doing any injury. That on these grounds, he is justly entitled to retain the prize, and it ought by no means to be given to the owner of the ship, his captain or mariners, who all ought to be satisfied with the stipulated reward for the hire of the vessel and their labours.

Such are the arguments which may be made use of in support of each of the above opinions. Before I proceed to state my own, I must premise, that there exists a decree of the board of directors of the *West-India* company, by which it is provided, "that fifty per cent. of the proceeds of every prize which shall be taken by a vessel hired out on freight, shall be paid to the company." This decree has been sanctioned by the states-general, and inserted in the instructions of the 15th of *July* 1633, for privateers cruising in the *American* seas.

It is clear, that the directors, when they made that decree, attended only to the interest of their company, nor had the states-general any thing else in view when they gave it their sanction; for, they made no rule whatever in this respect for other privateers than those above mentioned. It must, therefore, be considered as a special law, made with a view to particular persons and circumstances, and which is not to prejudice other cases to which it is not directly applicable.

As I have never seen a general law upon this subject, nor do I believe that any exists, the question is to be decided by the light of reason alone. On equitable principles, I think that the prize ought to be adjudged to the captain of the capturing vessel and his crew, and not to the owners or freighters. The latter, indeed, are the last who will be thought of. The owner of the ship appears better entitled, but still I would prefer to him the captain and crew. Others, however, have been of a different opinion.*

* In a case of salvage, which bears the strongest analogy to a case of unauthorized capture, (on the supposition that any persons, others than the sovereign of the captor, may be considered as entitled to the prize,) the late

In the year 1667, a ship sailing under a license from the *French and Dutch West-India* company, which had been granted to the freighters, captured an *English* vessel within the company's limits. The captors determined to keep the prize with them, though she was a worse sailer than their own vessel, because on consulting together, they agreed, that it was most advisable for the interest of the *owners and freighters*, as well as their own, that she should be carried into one of the *West-India* islands, where it was expected she would sell to better advantage. The question then occurred, to whom that prize was to be adjudged? The lawyers who were consulted on that question, decided, that the mariners, because they had been hired at a fixed salary by the month, and had not engaged themselves for shares of prize-money, should only have *one tenth* of the proceeds, and that the remainder should be equally divided between the *owners and freighters*.

I do not know upon what principle those gentlemen allowed one tenth to the mariners, nor perhaps did they know themselves. It seems, that they had no difficulty as to the one half of the remainder, which they gave to the owners of the ship; and therefore, they pass it over without assigning any reason for it; but they endeavour to justify, by argument, the allowing of the other half to the freighters. They contend, that it was by virtue of the license which the shippers had obtained from the *West-India* company, that the vessel was permitted to navigate to the *West-Indies*, that therefore they contributed, in a considerable degree, to the capture, and ought not to be placed in a worse situation than the owners of the ship. They say, that the mariners did not take the prize for the benefit of the owners of the ship only, but also for that of the owners

judge *Winchester*, district judge of *Maryland*, allowed *one ninth* part of the neat salvage to the *owners and freighters* of the salvor-ship, in proportion to their respective interests, in consideration of the risk to which their property had been exposed. The supreme court of the *United States*, before whom the cause was ultimately carried by appeal, increased the allowance to *one third*. The remainder was distributed among those who had been personally instrumental in the salvage. *The Blaireau*, 2 *Cranch's Reports*, 240.

of the merchandize, and that they declared it themselves, in the resolution which they took, as above mentioned, to carry the prize into one of the *West-India* islands, *for the best advantage of the owners and freighters*. To these they add, a variety of other trifling and frivolous arguments; as for instance, that the possession of things is not acquired merely by ourselves, but also by those persons who are employed by us; that the owners of the ship were not present any more than the freighters, when the capture was made, and that if the ship, instead of capturing, had been captured, the owners of the goods on board would have suffered a considerable loss.

But I am not at all convinced by such arguments as these, nor by those which I have mentioned above, in favour of the owners of the capturing ship; for, it is clear, that a prize by whomsoever taken, belongs solely to the captors, unless they acted by the command or under the appointment of another person. The only question, therefore, is, *who took the prize?* and it is manifest, in this case, that it was the master and mariners, and that they did not do it by the command or direction of another. Their services were, indeed, hired, but for the mere purpose of carrying goods, and for nothing else: Whatever advantage, therefore, may arise from the carrying of the goods, ought to be for the benefit of those who have made use of the agency of others for that purpose; but neither they, nor the owners of the ship are entitled to any share of the prize, because the mariners were not employed to make that capture, but, while they were attending to a business of a quite different nature, to the mere navigation of the vessel, fortune threw something else in their way, *fortuna aliud dedit*, as *Tryphonius* elegantly argues, in an analogous case.* For the same reason, in the case of a labourer, who, digging the ground, had found a treasure, I gave it as my opinion, that he was entitled to it.† The condition of the labourer in that, and, for the same reason, of the mariner in the present case, does not extend farther than the business for which they were hired. Whatever is out of it, that is to say, whatever is

* ff. de Acquir. Rer. Dom. l. 63. § 3.

† Obs. Jur. Rom. l. 2. c. 4.

foreign to the subject of their contract, they are alone to suffer or enjoy, whether it be profit or loss.

This case clearly comes within the general doctrine of *principal and agent*. Now, the agent shall certainly not impute to his principal, that he was robbed by highwaymen, lost his property by shipwreck, or that he or his family being taken sick, he had spent a sum of money which had been put into his hands for a particular purpose; for, such occurrences are more properly to be imputed to accident than to the agency, as *Paulus* justly observes.* Such losses as these follow the person of the agent; while on the other hand, it is natural, as *Paulus* also very correctly says, that "those gains and advantages which happen by occasion of the agency, should follow it."† If *A* has sent *B* to carry something to *C*, and *B*, in the way, has found a sum of money, or has extorted something from a highwayman who attempted to rob him, no one, certainly, whose mind is not very weak, shall think that the money which *B* has so extorted, belongs to *A*, although the things which he was sending to *C* might have been endangered by it. He did not order *B* to find money, nor to extort any thing from highwaymen, but to carry some articles, which he did carry, and his agency being thus fulfilled, *A* has nothing more to ask of him.

The arguments of the advocates on the subject of the present question are really trifling. The *license* which the freighters had obtained from the *West-India* company could not avail them to make prizes, but only to navigate in the *American* seas. Nor are we to cavil about the words of the resolution of the mariners above mentioned, when they are susceptible of so many different interpretations. I think that they had no other object in view than to retain the prize with them, to whomsoever it might belong, whether to the owners, the freighters or themselves, or that the words rather signified, that they meant to divide it into three parts, and to give one to each of the said parties. Or perhaps (saving the decree of the board of directors) they might have believed that the

* ff. Mandat. l. 26. § 6.

† ff. De Reg. Jur. l. 10.

prize belonged to them alone; as if the vessel was laden with provisions or other necessities of life, which they themselves were in need of, and thus might be useful to the owners of the ship and goods, by enabling them to prosecute the voyage, or they might have had various other motives of the same kind. And who will dare to suppose, that those mariners weighed and considered so particularly the words of their resolution, and that if the prize did belong to them, they wished to abandon their claim to the whole of it? Nay, if they had even believed that it did not belong to them, but to the owners and freighters, who would not excuse their simple honesty? He, who, thinking, that what is his own property belongs to another, gives it up to him, is not to suffer by it. Let not an error in point of law, be objected to those good mariners, since, as well from the resolution itself as from other circumstances, it appears that they made no final determination, and it is sufficiently clear, that they never had an intention to give up any right to which they might be entitled. It is true, however, that if they had fought more than was necessary for their defence, and the ship or goods had suffered by it, they would have been bound to an indemnity by the terms of their contract.

On these principles, a cause was formerly decided by the court of *Brussels*, which I think, bears a strong analogy to the present case: A person had lent a horse to the commandant of a corps of cavalry, to fight with; the court were of opinion, that the lender of the horse was not entitled to a share of the booty which the officer took with it. I fully approve of the legality of this sentence, though it has been doubted by some, and *Zouch** refers us to a contrary opinion, given by *Petrinus Bellus*;† there was, however, in that case, much more equity in favour of awarding a part of the booty to the officer, as it was nothing to him, whether the person to whom he lent his horse, should fight or not. And yet, he had no more right to the prize, than one who lends his net to another, has a right to the fish that he takes with it.

* *De Jure Fec.* p. 2. § 8. Q. 17.

† *De Re Milit.* P. 4. tit. 8. n. 8.

It will be said, perhaps, that I am wasting words on an idle and useless question, as it is unlawful to make captures without a commission from the states-general, or the admiral, and so far from the one who takes a prize without such a commission, being entitled to it, he is rather to be considered as a pirate, agreeably to the principles which I have above contended for. But this does not follow in every case. *Grotius* very properly says,* that "a private capture is acquired to a private captor, and there can be no doubt, that a prize taken under circumstances of necessity, by non-commissioned vessels, belongs to those who have taken it." I know, that the authority of *Puffendorff*† is adduced to the contrary, but he does not contradict this doctrine; for he speaks of those, who, without any authority, go out for the *express purpose* of making captures, not of those, who, being attacked by an enemy, turn upon him *in their own defence*, and these are the persons that I am speaking of. If, in such a case, it is denied, that it is lawful to take the enemy's property, it must be denied also, that it is lawful to despoil him, who otherwise will despoil us, and there must be an end to the right of self-defence. And yet, every declaration of war not only permits, but expressly orders all good and loyal subjects, to injure the enemy by every possible means, that is to say, not only to avert the danger with which the enemy threatens you, but to capture‡ and strip him of all his property. The case is different with those who sail out on cruises, without a commission, and without complying with the previous requisites of the law, because they are prohibited from doing so by various edicts of the states-general. But how can he be expected to have a commission, who, sailing merely for the sake of trade, meets an enemy who attacks him, and captures him in his own defence? If *Grotius* and *Puffendorff* had explained themselves in this

* De Jure B. ac P. l. 3. c. 6. § 10.

† De Jure N. and G. l. 8. c. 6. § 21.

‡ We have not meant to include such justifiable captures by non-commissioned vessels, in our definition of piracy, above, p. 128. We have, therefore, used in it the word *depredations*, as implying illegality, *ex vi termini*.

manner, those who now find fault with both, would have had no occasion to do it.*

* In *France* and *Great-Britain*, prizes taken by non-commissioned vessels belong to the lord high admiral, as a *droit* of his office. 1 *Valin's Comment.* 79.—*British order in council, of the 6th of March 1665-6, in a note to the case of the Rebecca*, 1 *Rob.* 193. *Amer. edit.* No distinction is made, whether the captor did or not make the capture in his own defence, or from some other justifiable motive. But, as in *Great-Britain* the office of high admiral is vested in the king, and has for a long time been executed by commission, suitable rewards are given, at the discretion of the government, in meritorious cases. And we presume, that the government of *France* is not backward in displaying its liberality on similar occasions. T.

CHAPTER XXI.

Of Insuring enemy's property.

NEXT to the contracts of purchase, sale and hire,* there is none, at present, in more frequent use, in commercial countries, than that of *insurance*. It was, however, so entirely unknown to the ancients, that no trace of it is to be found in the volumes of *Roman* jurisprudence. The reason probably is, that commerce was not at that time carried on to the same extent that it is at this day. Perhaps, also, the fleets of the *Romans* secured their merchant vessels from depredations at sea, or the vast extent of their empire, bordering on all the seas which their navigators were in the habit of frequenting, dispelled all fears of enemies. Nor was there so much to be feared as there is at present from the dangers of the ocean, as their vessels generally sailed coastwise, prudently keeping within a small distance from the shore, and did not venture out to sea in the winter months,† whereas our ships at present sail out to any distance, and we trust them at all times and in all seasons to the treacherous element, without knowing whither the fates may carry them.

I have read, however, in *Suetonius's* life of the emperor *Claudius*, that during a time of great scarcity, when the people abused him, and shewed him, by way of reproach, fragments of stale bread, he not only gave great encouragement to the

* *Locatio, hiring or letting to hire.* At the civil law, the signification of this word is very extensive; *locatio operum*, is when a man hires out or engages his labour to another for a specific reward; *locatio rerum*, is the hiring or letting to hire or farm (as we call it) of property of any kind, whether real, personal or mixed. T.

† *Ex die tertio Iduum Novembriæ, usque ad diem sextum Iduum Martii maria clauduntur.* The seas are closed from the eleventh of November, to the second of March. *Veget. de Re Milit.* l. 4. *Justinian's* code permits navigation from the first of April to the first of October. *Cod. de Naufrag.* l. 3. T.

building of ships, but proposed certain profits to the merchants, taking upon himself the risk of any loss that might be occasioned by the violence of the winds and seas. This was a species of insurance, which is nothing else than an engagement for the safety of another's property, by which the owner is liberated from the risk, which is assumed by the insurer, in consideration of a certain præmium.* *Claudius*, indeed, assumed upon himself the dangers of the sea, but he did it gratuitously and not for the consideration of a *præmium* or reward; nor did he undertake to bear the losses which might be suffered from pirates; therefore, I say that it was only a *species* of insurance.†

I have premised a definition of the contract of insurance, in order to make it appear, that the reason of war absolutely requires the prohibition of insurance on the ships, merchandize or other property of enemies. For, what else is assuming the risk to which their property may be exposed, than promoting their maritime commerce? The object of insurance is, that maritime trade may be carried on with the greatest possible profit, and the least possible loss. Hence, the states-general, on the 1st of *April* 1622, while we were at war with the *Spaniards*, issued an edict, annulling all insurances made and to be made by *Dutch* subjects on *Spanish* property, and laying a fine of one hundred pounds, *Flemish*, on all who should act

* The definition, which our author gives of the contract of insurance, is very similar to that which had been given, long before him, by *Roccus*, which is still the most logical and comprehensive of all that have ever been offered. "Insurance," says that able writer, in the excellent translation of his two treatises, (*on ships and freight and on insurance*), lately published at *Philadelphia*, by Mr. *J. R. Ingersoll*, "is a contract by which a person assumes upon himself the risk to which the property of another may be exposed, and binds himself, in consideration of a certain præmium, to indemnify him in case of loss." *Ingersoll's Roccus*, p. 85. T.

† For a full and complete view of all that is to be found in the works of the ancients which may be considered as having any relation to the subject of insurance, see Mr. *Park's* introduction to his *System of the Law of Marine Insurances*, which is fraught with a great deal of information on this particular subject, from whence Mr. *Park* justly concludes with our author, that the contract of insurance, as at present understood, was not known to the ancient *Greeks* and *Romans*. T.

to the contrary. This was extremely proper, because, in all declarations of war, the subjects are ordered to do as much harm as they can to the enemy, and therefore, it follows, that they are prohibited from doing them any good. Such are the rules prescribed by the general law of war, and the states-general did no more than declare that law during the war with *Spain*, by their edict of the 2d of *April* 1559.

It may, perhaps, be said, that such insurances are productive of more profit than loss to the insurers, and therefore, that they are more advantageous to us than to the enemy. But this may prove a very fallacious reasoning, for the result of insurances on enemy's property, is, in a national point of view, very uncertain, nor does experience sufficiently enable us to judge of their effects upon the nation at large; while on the other hand, it is very certain that the enemy thereby acquires the means of extending his maritime commerce. It therefore, follows, that what is certainly useful to our enemy, and almost as certainly threatens our own destruction, is, on every principle, to be prohibited.*

* Trading with enemies, and insurances on enemy's property have been prohibited, from the earliest times, in almost every country of *Europe*. *England* and *Holland* are the only ones that are known to have pursued, for a while, a different policy. The ordinance of *Barcelona*, made in 1484, expressly forbids such insurances to be made, directly or indirectly, *no puxen esser aseguradas directamen o indirectamen*. *Cleirac, Us & Coutumes de la Mer*, p. 118.—*Consol. del Mar*. (*Boucher's Fr. transl.*) vol. ii. p. 717. § 1540. *Le Guidon*, a very old treatise on maritime law, declares it to be unlawful to trade with enemies, and to make insurance on enemy's property, c. 2. art. 5. in *Cleirac*, p. 117. Mr. *Valin* mentions several ancient ordinances of *France* to the same effect, which shew, that the law was always so understood in that country. But he observes that the *English*, during the seven year's war, were in the habit of insuring the property of the *French*, even when bound from a *French* port to a *French* colony, or from one *French* port to another. "By this means," says he, "one part of the nation restored to us, by the effects of the contract of insurance, what the other took from us by the law of war." 2 *Valin's Comm.* p. 32.

It is certain, that in *England*, not only during that war, but during that which immediately preceded, and that which immediately followed it, that is to say, during a period of near half a century, trading with enemies, and insurances on enemy's property were carried on to a great extent, and were sanctioned by the decisions of the tribunals of that country. In the

This reason alone would have been sufficient to justify the said edict of the 1st of *April* 1622, but it also adverts to a consequence that would follow, if those insurances should be

year 1749, lord *Hardwicke* considered an insurance as legal, which had been made on an *English* vessel that had been sent to *Ostend*, to be neutralized, and from thence to trade with the enemy, under cover of the neutral flag. He said, that "it had never been determined, that insurance on enemy's ships, during the war, was unlawful; and that it might be going too far to say, that all trading with enemies was prohibited by law, for the general doctrine would go a great way, even when *English* goods were exported, and none of the enemy's imported, which might be very beneficial." *Henkle v. Royal Exch. Ass. Comp.* 1 Ves. 317.

During the *American* war, insurances of this description were neither less frequent nor less favoured by the *English* tribunals. *Planché v. Fletcher*, was the case of a *Swedish* ship, laden for *French* account, and bound directly from *London* to *Nantz*, with a simulated destination for the neutral port of *Ostend*. *Doug.* 251.—*Thellusson v. Ferguson*, was an insurance on a *French* ship, which had sailed under *French* convoy from a *French* colony to a port in *France*. *Ib.* 361. In both these cases, the property insured had been condemned by the *English* court of admiralty, but the insurances were, nevertheless, held valid; and thus, the courts of common law sanctioned and encouraged the same acts which the courts of admiralty punished. In the former case, it was objected, that in time of war, the exportation of enemy's property, even in neutral bottoms, was illegal, and that an insurance upon such goods was void; but, lord *Mansfield* overruled the objection. "It does not appear," said he, "that the goods were *French* property; an *Englishman* might be sending his goods in a neutral ship. But it is indifferent whether they were *English* or *French*; the risk insured, extends to all captures." *Doug.* 252, 253. It is but justice, however, to observe, that sir *William Scott* has expressed doubts of the correctness of the report of this decision. *The Hoop*, 1 Rob. 182. *Am. ed.* But, in a subsequent case, *Gist v. Mason*, which was decided on by the court of king's bench, in the year 1786, lord *Mansfield* appears to have been even astute, to establish his favourite doctrines, and to give, as much as possible, a legal sanction to the trade of *British* subjects with enemies, and to their insurances on enemy's property.

This was not a case of insurance on property belonging to enemies, but on *English* property shipped on board of a neutral vessel, employed in the trade between *Ireland* and the enemy's colonies. The report does not state, whether the insurance was on the ship and goods, or on the vessel only, but it could not have made any material difference; because, if it was unlawful for *British* subjects to ship their merchandize to the *French* colonies, the means could not be legal, when the end was prohibited.

In this case, lord *Mansfield* is reported to have said: "This, on the face of it, is the case of a neutral vessel. It is no where laid down, that policies on

considered as lawful. The very property taken by our own subjects from the enemy, might be claimed by the underwriters. And why should it not, if their contract was legal? It is well

neutral property, though bound to an enemy's port, are void. And, indeed, I know of no cases, (except two, both of which are short notes,) that prohibit a subject trading with the enemy. By the maritime law, trading with an enemy, is cause of confiscation in a subject, provided he is taken in the act, but this does not extend to *neutral vessels*." 1 *Term Rep.* 85. Lord *Mansfield* here appears to have, as much as possible, kept the cargo out of view, and to have endeavoured to palliate the illegality of its destination, by holding up the *neutrality of the vessel*.

As to the *expediency* of permitting such insurances, he expressed himself in a clear and decided manner. "It is," said he, "for the benefit of the country, to permit these contracts, upon two accounts; the one, because you hold the box, and are sure of getting the premiums, at least, as a certain profit—the other, because it is a certain mode of obtaining intelligence of the enemy's designs." *Park on Ins.* 316. 6th edit.

But, during the last war, the tribunals of *England* entirely discarded their former ill judged policy, and restored, to all appearance, on a firm basis, the ancient principle of the law of nations. In the year 1794, a death blow was given to insurances on enemy's property, in the cases of *Brandon v. Nesbitt*, and *Bristow v. Towers*. 6 *Term Rep.* 23. 35. Nothing, however, was finally decided, as to the legality of trading with an enemy, until sir *William Scott*, in the year 1799, gave his able and luminous judgment, in the case of the *Hoop, Cornelis*, 1 *Rob.* 165. *Am. ed.* which was soon followed by that of the court of king's bench, in *Potts v. Bell*. 8 *Term Rep.* 548, in which it was held to be illegal, on general principles, for a subject to trade with an enemy. We observe with pleasure, that these decisions were principally founded on the authority of the irresistible arguments of our author in the present chapter; it is not the only instance in which he has had the honour of giving the law to the tribunals of the great nations of *Europe*.

That lord *Mansfield* made the well known principles of the law of nations yield to his favourite policy, is at present too well authenticated to be denied. "On the *legality* of these insurances," says Mr. *Justice Buller*, "I never could get him to reason. He never went beyond the ground of *expediency*." *Bell v. Gilson*. 1 *Bos. & Pul.* 354. "He always," says lord *Alvanley*, "entertained doubts upon the law, and endeavoured to keep out of sight, a question which might oblige him to decide against what he thought for the benefit of the country." *Furtado v. Rogers*. 3 *Bos. & Pul.* 197.

From this and other instances which might be adduced, it is evident, that the law in *England* is made to subserve the great political interests of the nation, and varies with the notions of policy that are entertained at different times. It behoves us, therefore, to consider how far we are bound implicitly to adopt the rules laid down by *English judges*, in cases which may affect their political concerns, on the mistaken supposition that they are founded on the principles of the *ancient common law*. The situation and interests of

known, that property insured, belongs in a certain manner to the insurers, and they are, in a great degree, identified with the owners, as appears by the printed policies that are in every body's hands. If, then, the underwriters could thus claim enemy's property, after it had been lawfully captured, it would not only occasion a considerable loss to the captors, but it would, (as the edict justly observes,) deter them from fitting out vessels to cruise against the enemies of the state. Surely, there can be nothing more directly in opposition to the law of war.*

America and Great-Britain are known to differ in many essential points, and therefore, the rules by which the one is led to prosperity, may prove greatly injurious to the other. We have had frequent occasion to observe, that many of their belligerent principles are entirely unsuited to our neutral situation, and this is so true, that the state legislatures have been obliged to make laws to counteract the effects of the application of British doctrines, as has lately been done in Pennsylvania, with respect to the conclusiveness of the sentences of foreign prize courts. But, we observe also, with regret, that in some of the states they have gone so far as to prohibit the reading or citing, in courts of justice, of British adjudications of a date posterior to the American revolution. It is paying a poor compliment to the patriotism and intelligence of the judges who grace the benches of our superior tribunals, and a degrading tribute to the presumed superiority of British jurists, to suppose, that their opinions would obtain an undue influence or ascendancy over those of our own countrymen. To the sound discriminating minds of our enlightened judges, (aided from time to time by special legislative acts,) it might safely have been left to decide, how far the principles adopted by the tribunals of Great-Britain are consonant with our own national policy, which undoubtedly is as much a part of our law, as that of the English is a part of theirs. T.

* It does not seem to follow, because the loss suffered by the capture of enemy's property may be recovered from the underwriters, that the property itself may be recovered by the insurers from the captors; but the effect of such insurances is certainly, as *Valin* happily expresses it, that the nation which permits them, restores with one hand what it takes with the other.

We cannot help adverting here to what might be considered as another striking instance of injudicious policy, if we were not assured from high authority, that it originated in misapprehension and mistake. We mean to speak of the doctrine of *conclusiveness*, as applied to the sentences of *foreign prize courts*, which has so often frustrated, to the great loss of the parties insured, the insurances made in *England* upon neutral property. The ships and cargoes of neutrals are insured there for high *war premiums*, against capture and its attendant confiscation by the enemies of *Great-Britain*; but, as the law is understood in that country, (and surely the unfortunate neutral is not aware

So far, no fault can be found with the said edict of the 1st of April 1622. But I have discovered a supplement to it, of the 13th of May in the same year, by which it was declared, that the edict should only operate on those insurances which were or should be made after its publication; as if this was a proper subject for the application of the rules of the *Roman* code, on the subject of *ex post facto* laws.* It would seem,

of it, otherwise he would not subscribe to such an unequal contract), if condemnation takes place, the sentence is in most cases considered as *conclusive* evidence of the property insured being *enemy's property*, and the innocent neutral being thus convicted of *fraud*, the insurer is allowed to *retain the premium and to pay no loss*. In this manner, premiums to an immense amount, have been earned by *English* underwriters, without risk, and neutrals have paid their money without being compensated for their losses. Such are the effects of the celebrated doctrine of *conclusiveness of foreign sentences*, so justly reprobated by two of the greatest law characters of our age, lords *Thurlow* and *Ellenborough*; *Donaldson v. Thompson*, 1 *Campb. N. P. Rep.* 429. These consequences were not contemplated, we are sure, by the respectable judges of *England*; but they, nevertheless, certainly followed, and at last it was found necessary to tolerate the evasion of that law by a special clause annexed to policies of insurance; (*Lothian v. Henderson*, 3 *Bos. & Pul.* 499.) otherwise, the *British* insurance offices would have been entirely deserted by neutrals. And yet it is supposed to be founded on a principle of the law and comity of nations, which, we would presume, it does not belong to individuals to dispense with.

It is much to be wished, that this fatal doctrine may be exploded throughout the *United States*, as it is in *Pennsylvania* and *New-York*. While our property is more than ever exposed to the captures of belligerent cruisers, and to the unjust condemnations of foreign tribunals, the effects of such a principle must be to deprive our citizens of the benefit of insurance in such cases, and thus to further the views of those powers who may wish to check our commercial career. We do not receive immense sums in premiums from *foreigners*; *American* property, principally, is insured in our offices, and those insurances ought to be made as effectual as possible, that the risk and the loss may be divided among many, instead of falling upon a few. It is true, that we, also, can evade the doctrine in question, by a special clause; but a law which requires to be evaded is a snare to the unwary, and is necessarily a bad law.

We beg leave to refer the reader on this subject to the able and conclusive opinion of the honourable judge *Cooper*, of *Pennsylvania*, delivered in the high court of errors and appeals of this state, in the case of *Dempsey v. The Insurance Company of Pennsylvania*, and published with an excellent introduction, by Mr. *Dallas*; *Philadelphia*, *Byrne*, 1810. T.

* *Leges & constitutiones futuras certum est dare formam negotiis, non ad facta præterita revocari: nisi nominatim & de præterito tempore, & adhuc pendentibus*

that the states-general considered that the insurance of enemy's property was legal, unless it was prohibited by an express law, otherwise, there was no reason for not annulling those insurances which were made before the publication of the edict, as well as those which were made afterwards. The edict had been very properly expressed in general terms, and had made no such exception; and, as it did not enact a new law, but was merely declaratory of the law of war, the supplement is rather to be considered as an oversight of the legislature, than as a law actually binding. So much of the edict, indeed, as inflicts a penalty, may very properly have been restricted to future cases; but not so the prohibition itself: unless, perhaps, we should say, that the insurance of enemy's property had before prevailed to such a considerable extent, that it had acquired the force of an ancient custom or usage. Nevertheless, even if there should be a great many instances of insurances of that description, I would not take it to be such an usage as is considered to have the force of law, unless it should be confirmed by an uninterrupted series of judicial decisions.

The states-general, therefore, acted in conformity to the law of nations, when, on the 31st of *December* 1657, they made an edict, prohibiting the insurance of the goods of the *Portuguese*, with whom we were then at war; but I cannot say the same thing of a clause which they added to it, by which they extended the prohibition to the insurance of *any merchandize whatever*, going to or coming from the *Portuguese* dominions: for, if those goods belonged to subjects of the states-general, or to allies or neutrals, there was no reason to prohibit their being insured, as the trade with *Portugal* was not prohibited, except as far as related to contraband of war. To these, therefore, the prohibition ought to have been restricted; in other respects, the freedom of insurance ought to have been co-extensive with the freedom of trade. The states-

negotius cautum sit. The laws are only to affect future and not past transactions, unless made with an express reference to them. *Cod. de Legib.* l. 7.

T.

general, however, on the 9th of *March* 1665, being at war with *England*, issued a similar edict, by which they prohibited the insuring of any merchandize going to or coming from the *English* dominions. They did the same thing on the 9th of *March* 1689, during the war with *France*, and thus interrupted the lawful commerce, not only of our own subjects, but of foreigners.* It is thus, that edict-makers content themselves with transcribing those of a prior date, and when once an error (though ever so contrary to the law of nations) has crept into one of them, it is copied, without reflection, into every new law that is made on the same subject, and no one troubles himself about rectifying it.

Upon the whole, it appears, even from subsequent edicts of the states-general, that it is not lawful to make insurance on *enemy's property*; and because the thing is of daily occurrence, I wish the prohibition had been inserted in all the general and special laws which the states-general have enacted from time to time, respecting that species of contract. I wish also, that *Straccha*, *Santerna*, and other *semi-barbarians*,† who have written on the subject of *insurance*, had left this question entirely untouched, and had contented themselves with observing, that unlawful merchandize, as for instance, *contra-*

* It would seem, however, that although it is not lawful for a belligerent nation to obstruct the commerce of neutrals with their enemies, yet they may lawfully prohibit insurances on such trade within their own dominions, and that such a prohibition is no more than the lawful exercise of the right of *municipal* legislation. T.

† Our author is much too severe on those ancient writers, to whom we are indebted for the first methodical treatises on *commercial* and *maritime* law. Nor has he spared that venerable work, the *Consolato*, (above, p. 44), which has been the foundation of almost every subsequent maritime code. Far from joining in his opinion, we wish that those books were more frequently read and consulted than they are; they would be found to contain many excellent principles, which, in our modern times, have been unfortunately too much lost sight of. See the excellent decree of judge *Davis*, (district judge of *Massachusetts*), on an important question, respecting *mariner's wages*, the solution of which has been afforded him by a text of the *Consolato*. 2 *Amer. Law Journ.* 359. *Il Consol.* c. 127. and in *M. Boucher's* translation, c. 130. vol. ii. p. 195. § 321. T.

band of war, could not be insured. For my part, I shall express in a few words, what I conceive to be the law upon this subject. I think, that it is not lawful to insure any ships or goods which are liable to capture by the law of war; but as to those which cannot be made lawful prize, I see no reason why they should not be insured.

I shall conclude with adverting to what some of our writers have said on the subject of insuring goods which are liable to condemnation. *Grotius** is of opinion, that he who has insured contraband goods, not knowing them to be such, is not bound to pay the loss. Others have said,† that he who has subscribed a policy in general terms, is released from his engagement, if the owner of the goods insured turns out afterwards to have been an enemy; for, enemy's property is never considered as being included in a general description, but must be expressly declared and made known to be such, to the underwriter.‡

* Consil. Holland. vol. 3. Cons. 175.

† Ibid. vol. 2. Consil. 332.

‡ A very correct general rule has lately been introduced in *England*, upon this subject. "Whenever," says *Park*, "an insurance is made on a voyage expressly prohibited by the common, statute or maritime law of the country, the policy is of no effect. *Park on Ins.* 307. 6th ed. Even though the insurance be made in general terms, a clause or proviso, excluding the prohibited risk, is always considered as ingrafted in the policy. *Purtado v. Rogers*, 3 Bos. & Pul. 191. *Kellner v. Le Mesurier*; *Brandon v. Curling*, 4 East, 396. 410.

According to the above decisions, the capture of *neutral* vessels by the cruisers of *Great-Britain* or her co-belligerents, is considered as a prohibited risk, "because," says lord *Ellenborough*, "it is repugnant to the interest of the state, and has a tendency to render the *British* operations by sea ineffectual." *Kellner v. Le Mesurier*, 4 East, 402. This is certainly correct, on the ground of *state policy*; but, another reason, founded on the broad basis of the law of-nations, is afforded by our own judge *Johnson*, (one of the judges of the supreme court of the United States, and presiding judge of the courts which compose the sixth federal circuit:) "a neutral," says he, "who is captured for having violated his neutrality, is considered by the belligerent as an *enemy* waging an *individual war* against his nation, and is abandoned by his own government as such." *Rose v. Himely*, *Bee's Admiralty Reports*, 322. It follows, from this principle, that all risks of capture, by the armed vessels of the nation to which the insurer belongs, may be properly classed within the general prohibition against insuring

But, I think, that even though it be expressly mentioned and designated in the policy, yet, when enemy's property or contraband goods are insured, the insurance is void, and it depends on the will of the parties to fulfil or not, the contract which they have entered into; but no judicial recovery can be had thereon.

enemy's property. And, indeed, according to the *formula* which is used at present by the courts of admiralty of *Great-Britain*, whatever may be, in point of fact, the specific ground of condemnation of a *neutral* vessel or cargo, no other reason is assigned in the decree, but that it belonged, at the time of capture, to the *enemies* of that country. *Horne's Compend.* 148.

T.

CHAPTER XXII.

Of enlisting Men in foreign countries, and, incidentally, of Expatriation.

I ENTER upon the discussion of a question which has been, and is still, the cause of much disturbance in many of the kingdoms and states of *Europe*: Whether it is lawful to enlist men in the territory of a friendly sovereign? Let it not be imagined, that I mean to contend, that it is lawful to entice away soldiers, by bribes or solicitations, from the service of another prince, in order to enlist them into our own. I know too well, that those who promote desertion, are not less guilty, and do not deserve a less punishment than the deserters themselves;* and, indeed, among some nations, that crime has even been construed into high treason. The question which I am about to investigate, is of a quite different nature. It is, whether a prince may, in the territory of a friendly sovereign, enlist private individuals who are not soldiers, and make use of them in war against his own enemies? It is certain, that if a prince prohibits his subjects from transferring their

* The important question respecting the delivering up, or as it is called, the *extradition* of deserters from one country to another, has been the subject of much controversy in *America* as well as in *Europe*, and is not yet at rest. It has been but slightly touched upon by some of the writers on the law of nations, and by others not at all. *Vattel* says nothing upon it. *Hübner* lays it down as a general principle, that "a neutral sovereign may receive in his dominions, and even among the number of his subjects, deserters from either of the belligerent armies, unless he is obliged to deliver them up by a special convention, called a *cartel*." 1 *Hübner. De la Saisie*, &c. p. 32. But *Galiamini* distinguishes and contends, that if the army from which the soldiers desert is on the neutral territory at the time when the desertion takes place, as for instance, if it has been allowed the right of passage, the neutral sovereign is bound to deliver up those who have deserted their colours within his dominions; otherwise, it will be considered as a violation of the laws of hospitality. *Galiamini, De' doveri*, &c. l. 1. c. 8. § 4. T.

allegiance and entering into the army or navy of another sovereign, such sovereign cannot, with propriety, enlist them into his service; but, where no such prohibition exists, (as is the case in most of the countries of *Europe*), it is lawful, in my opinion, for the subject to abandon his country, migrate into another, and there serve his new sovereign in a military capacity.

It is lawful, I repeat it, if there is no law that prohibits it, for a subject to change his condition, and transfer his allegiance from one sovereign to another. The writers on public law are all of this opinion; nor does *Grotius* dissent from them, but he adds, that expatriation is not lawful among the *Muscovites*; and we know, that it is unlawful also among the *English* and *Chinese*. We know likewise, that *Louis XIV.* king of *France*,* declared by an edict of the 13th of *August* 1669, that those of his subjects who should, without the permission of the government, emigrate from his dominions, with the intention never to return, should be punished with the forfeiture of life and goods. Before that period, it was lawful to emigrate from *France*, and it is so wherever the country is not a prison.† And if it is lawful for a subject

* This edict was made with a view to the *Protestants*. It was in the same year that *Louis* the XIV. began to violate the edict of *Nantz*, by abolishing the *chambres mi-parties*, tribunals consisting of judges of both religions, which that edict had established. *Hénault, Abregé de l'Hist. de Fr. sub anno* 1669. He foresaw the immense emigration which its final repeal would produce, and thus vainly endeavoured to prevent it. T.

† By the first constitution of *Pennsylvania*, made on the 28th of *September* 1776, it was declared, (c. 1. § 15.), "that all men have a natural inherent right to emigrate from one state to another that will receive them." 1 *Dallas's Laws of Penn. append.* p. 54. The present constitution merely provides, (art. 9. § 25), "That emigration from the state shall not be prohibited." 3 *Dallas's Laws of Penn.* p. xxii.

The question, "whether it is lawful for a citizen to expatriate himself," has been brought several times, and in various shapes, before the supreme court of the *United States*. It was made a point, incidentally, in the case of *Talbot v. Jansen*, mentioned above, p. 136. In that case, it appeared to be the opinion of the court, that expatriation is lawful, provided it is effected at such time, in such manner, and under such circumstances as not to endanger the peace or safety of the *United States*. "The cause of removal," said Judge *Patterson*, "must be lawful, otherwise, the emigrant acts contrary to

to pass under the dominion of another prince, it must be so likewise for him to seek the means of procuring an honest

his duty, and is justly charged with a crime. Can that emigration be legal and justifiable, which commits or endangers the *neutrality, peace or safety* of the nation of which the emigrant is a member?" 3 *Dallas's Reports*, 153—"That a man," said judge *Iredell*, "ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere; much less where he must starve in one country, and may live comfortably in another, are positions which I hold as strongly as any man, and they are such as most nations of the world appear clearly to recognize. The only difference of opinion is, as to the proper manner of exercising this right." *Ibid.* 163. Judge *Cushing* concurred in the general principle, that expatriation is lawful, and approved of the doctrine laid down on this subject by *Heineccius, Elem. Jur. Nat. and Gent.* l. 2. c. 10. "But," said he, "the act of expatriation should be *bonâ fide*, and manifested at least by the emigrant's actual removal, with his family and effects, into another country." *Ibid.* 169. In the case then before the court, no such removal had taken place.

In that of *Murray v. The Charming Betsy*, it was decided, that a citizen of the *United States* who has *bonâ fide* expatriated himself, is to be considered as an *alien* for commercial purposes. One *Shattuck*, a natural born citizen of the *United States*, had for many years, resided with his family, and had been naturalized in the *Danish* island of *St. Thomas*. It was objected to him, that he had traded from that island with the *French colonies*, in fraud of an act of congress, by which all trade was interdicted to the citizens of the *United States*, with the dominions of *France*. But, the court were of opinion, "that an *American* citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of the general prohibitory laws of his native country." The court did not, however, determine, whether a citizen of the *United States* can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by *our own laws*, nor whether his expatriation would be sufficient to rescue him from punishment, for a crime committed against the *United States*. 2 *Cranch's Reports*, 120.

And lastly, in the case of *M'Ilvaine v. Cox's lessee*, it was determined, that a citizen of *New-Jersey*, who had gone over to the enemy during the revolutionary war, and had, since that time, remained in *England*, enjoying the privileges of a *British* subject, had not ceased to be a citizen of *New-Jersey*, and was entitled to claim lands by descent, in that state, because several laws had been made by its legislature, some before and others after his emigration, by which emigrants of that description were declared to be *fugitive citizens* and *traitors*, punishable as such, but were not considered as *aliens*. *Cranch's Reports*, vol. ii. p. 280. vol. iv. p. 209.

T.

livelihood, and why may he not do it by entering into the land or sea service? In the *United Provinces* there is certainly no law to prevent it, and many *Dutchmen*, formerly, as well as within my own recollection, have served other sovereigns by sea as well as by land.

When I speak of *other sovereigns*, I only mean those who are in amity with us; for, it is not lawful to enter into the military service of an enemy, by land or sea, and the states-general have prohibited it by several edicts. It may, indeed, be said, that several of the edicts which prohibit our citizens entering into the service of *any foreign prince or state*, as they speak in general terms, must be understood in the same manner, and not be exclusively applied to the service of an enemy. But, if those edicts are attentively examined, it will be found, that they are either occasional statutes, made in time of war, when the states-general were in want of men, or that they are expressly directed against those who then were or might afterwards have gone into the enemy's service, or against deserters from our own army or navy, who had enlisted themselves abroad. Once, a *Dutch* vessel was captured by a *French* privateer, having *eighty* men on board, all of them (except *six Frenchmen*) natives of *Holland* or *Zealand*; the states-general, justly exasperated, issued an edict, on the 28th of *July* 1674, by which it was decreed, that if any of our subjects should enter into the naval service of the enemy, they should be *drowned*. A similar edict was made on the 4th of *April* 1676. But those edicts only relate to such as serve the enemies of our country, and cannot be extended to those who enter into the service of a power in friendship or in alliance with us.

If, therefore, our subjects, whose assistance we do not want in time of war, and who are not prevented by any law from transferring their allegiance, may lawfully hire out their military services to a friendly prince, why may not also that friendly prince enlist soldiers in the territory of a friendly nation? Where it is lawful to let out to hire, it is lawful also to hire, and why should it not be equally so to contract for the hiring of soldiers in the territory of a friend, as to make

any other contract, and carry on any kind of trade. It will be objected, perhaps, that he who enlists the soldiers, may make use of them against a friend of the sovereign in whose country they have been hired, and perhaps also, against that sovereign himself; but these objections, in my opinion, are not of sufficient force.

As to the first supposition, that the soldiers may be employed to fight against a friend of their own sovereign, it must be observed, that neutrals are bound in war to consider both the belligerents as equally in the right. Such is the doctrine generally admitted as to the purchase and sale of warlike implements, which, indeed, we may not lawfully carry, but we may, in our own country, lawfully sell to either or both the belligerent parties, although we well know, that they intend to make use of them in war against each other.

To the second head of the objection, that the soldiers thus hired may possibly be employed against their own sovereign, I answer, that we are only to attend to the state of our country at the time, and ought not to look so far into futurity. Nor do I see any difference between enlisting men, and purchasing gun-powder, ammunition, arms and warlike stores, which may certainly be done by a friendly sovereign in our country, and which he may also use afterwards against us. I repeat it, the actual relations of our country are alone to be considered; otherwise, there must be an end to amity, friendship, and even alliances between princes.

I am of opinion, therefore, that the same law which obtains as to the purchase of implements of war, must apply in like manner to the enlistment of soldiers in the territory of a friendly nation, unless it should be expressly stipulated otherwise between the two sovereigns. Thus, in the treaty between the *Romans* and *Antiochus the Great*, king of *Syria*, the latter bound himself not to enlist soldiers within the limits of the *Roman* empire.* That treaty was not equal, otherwise he might lawfully have enlisted soldiers in the *Roman* dominions, nor could the senate have prohibited it without doing him an in-

* Liv. l. 38.—Polyb. Excerpt. Legat. c. 35. n. 4.

jury; for, while by the same treaty it was stipulated, on reciprocal terms, that neither of the contracting parties should supply the enemy of the other with provisions, to *Antiochus* alone it was forbidden to do that which otherwise may lawfully be done by every sovereign.

In the *United Provinces*, however, it appears to have been and is still prohibited by law, to enlist soldiers, without the permission of the states-general. There is an ancient edict upon this subject, of the 8th of *January* 1529. A similar edict was made on the 1st of *August* 1612, when the *Danes*, *Swedes* and *Muscovites* had made enlistments on the *Dutch* territory. Those nations were prohibited, by name, from doing the like, without having previously obtained the permission of the states-general in writing, and they were strictly forbidden to seduce the *Dutch* soldiers from the national service, under the penalty of death or some other discretionary punishment. There are a variety of subsequent edicts,* by which it is enacted, "that if any one shall seduce soldiers within the territory or jurisdiction of the *United Netherlands*, without the permission, in writing, of the states-general or their counsellors, the offender shall be liable, not to a discretionary penalty only, but to the punishment of death, without remission or mitigation."† As those edicts agree en-

* Edicts of the states-general, of the 16th of *December* 1622—3d of *March* 1627—30th of *March* 1646—21st of *July* 1648—20th of *January* 1652, and 18th of *March* 1658—of the states of *Holland*, of the 27th of *March* 1652, and 16th of *March* 1656.

† By the act of congress of the 5th of *June* 1794, mentioned in one of the preceding notes, page 129, it is provided (§ 2.) "that if any person shall, within the territory or jurisdiction of the *United States*, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the *United States*, with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a marine or seamen on board of any vessel of war, letter of marque or privateer; every person so offending, shall be deemed guilty of a high misdemeanor, and be fined not exceeding one thousand dollars, and imprisoned not exceeding three years. *Provided*, that this shall not be construed to extend to any subject or citizen of a foreign prince or state, who shall transiently be within the *United States*, and shall, on board of any vessel of war, letter of marque or privateer, which, at the time of its arrival withi

tirely with my opinion, I submit them to the reader, without observation or comment.

It may not be improper to notice here, a difference which took place in the year 1666, between the states-general, and the governor-general of the *Spanish Netherlands*. The states complained to him, that the bishop of *Munster*, with whom they were at war, had enlisted soldiers in the *Spanish* territories in the *Low Countries*. The governor answered, that he had not authorised him so to do, but that if he had, there was nothing to prevent him, as *Spain* was neutral in the war, and that the states-general might exercise the same right, if they pleased.* But, whether such a thing is lawful, without the consent of the sovereign, and whether the sovereign may, with propriety, refuse his permission, when applied to for it, is the very subject of our inquiry. Whether or not, the bishop of *Munster* had a right to enlist soldiers in the *Spanish Netherlands*, without the permission of the governor-general, the reader must determine for himself from what has been above stated.

the *United States*, was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince or state, who is transiently within the *United States*, to enlist or enter himself to serve such prince or state on board such vessel of war, letter of marque or privateer, if the *United States* shall then be at peace with such prince or state." 3 *Laws U. S.* 88.

T.

* Aitz. l. 46.

CHAPTER XXIII.

Of the right of the several provinces of the United Netherlands to declare and make war.

*I*N this chapter our author discusses a constitutional question, relating exclusively to his own country, under its former government. He inquires, "whether the united provinces of the Netherlands had separately the right of declaring and making war. From the tenor of one of the articles of the Confederation of Utrecht, (the federal constitution of the Dutch union), it would seem that they had not that power; for, it is there expressly stipulated, "that no war shall be made without the advice and consent of all the provinces;" but our author contends and argues at great length, that every power which by that treaty was not expressly granted, was retained by the several provinces; that before it was entered into, they separately had the right of declaring and making war, and had not explicitly parted with it. That the above-mentioned clause in their confederation was only applicable to national wars, entered into for the redress of national injuries; but that if a single province should receive an injury from a foreign state, it might lawfully avenge it by a separate war.

As we do not think that this chapter can interest our readers in any point of view, we have omitted it in this translation, and believe it sufficient to have given this general outline of its contents.

T.

CHAPTER XXIV.

Of Reprisals.

REPRISALS* were a thing entirely unknown to the ancient *Romans*, and cannot be expressed by an adequate word in their language. Some writers have used the words *pignoratio*, *clarigatio*, but neither of them renders with precision what we understand by *reprisals*. Nor had the *Romans* occasion for such a word, who paid the most sacred regard to the property of their friends, and who would have disdained to commit hostilities on those for whom they professed friendship, and to subject their good friends to indiscriminate plunder, by sea and land.

As there is no instance of such wickedness in the history of that magnanimous people, neither do their laws exhibit

* The word *reprisal*, according to its etymology, is synonymous with *recaption* or *retaking*, and the thing which is meant by it, is analogous in name as well as in substance, to the common law process of *withernam*; with this difference, that the one is a legal retaliation, exercised only on the goods and chattels of the party who has been guilty of the first tortious taking; the other is exercised on the property of all the individuals of the same nation. "For," says *Valin*, "it is a principle established by the universal law of nations, that all the subjects of a state are bound *in solidum*, to make reparation for the injuries done to foreigners by the state itself, or any of its members." *Traité des Prises*, p. 321.

Reprisals are either *general* or *special*.—They are *general*, when a sovereign, who has, or thinks that he has received an injury from another prince, issues orders to his military officers, and delivers commissions to his subjects to take the persons and property of the subjects of the other nation, wherever the same may be found. It is, at present, the first step which is generally taken at the commencement of a public war, and is considered as equivalent to a declaration of it.

Special reprisals are granted, in time of peace, to individuals who have suffered an injury from the subjects of another nation, and these alone are treated of in the present chapter.

T.

the least trace of it. How then shall we explain the stipulation which is contained in two different treaties* between *Spain* and the *United Provinces*, "that no letters of marque† or reprisal shall be granted, but with full knowledge of the cause, against those persons only on whom they may lawfully be issued by the *Imperial* laws and constitutions, and conforming to the regulations which those laws prescribe?" For, in the laws of *Justinian*, which are always understood by the general description of *Imperial laws* in countries that are not governed by an *emperor*, there is not a single word about *reprisals*, which, as I have already observed, were entirely unknown to the *Romans*. In order to rescue from the imputation of ignorance, the very learned men who drew up those treaties, I must suppose, that by *Imperial laws*, they meant the *law of nations*, which, as well as the law of *Justinian*, is denominated throughout *Europe*, the *common law*,‡ so that they must have considered the words *common* and *Imperial law*, as convertible terms. I cannot think of any other way of accounting for that mistake.

According to the *law of nations*, then, reprisals are not to be granted but with a *full knowledge of the cause*,§ nor for

* Truce of the 9th of *April* 1609, art. 11.—Treaty of *Munster*, of the 23d of *January* 1648, art. 22.

† *Letter of marque and reprisal* is the old technical expression for what we now call a *privateer's commission*. It still preserves, in law, the same signification, although it is common, at present, to apply the denomination *letter of marque*, by way of distinction, to a vessel fitted out for war and merchandize, and armed merely for defence. T.

‡ See note † above, p. 53. T.

§ In order that letters of reprisal may not be granted, without full knowledge of the cause, or without sufficient reasons, various wise precautions were taken by *Louis XIV.* in his *Ordonnance de la Marine*, of *August* 1681. By that ordinance, the party injured, is obliged, as soon as possible after the injury suffered, to cause the facts to be ascertained, and the damage to be estimated by a court of admiralty; after which, and not before, he may petition the crown for letters of reprisal; these are not issued until after a proper and fruitless application to the sovereign of the offending party, nor then, without sufficient security being given by the petitioner; and notwithstanding all that, if at a future day, the statement contained in the petition should be found not to be true, the petitioner is to be condemned to the payment of full damages and interest to the party whose pro-

such causes or against such persons as the law exempts from them, nor then without conforming to the rules and order of proceeding which usage has established. The first of these rules, is, that letters of reprisal are not to be granted, unless there has been a clear and open denial of justice. Hence, by the treaties above mentioned,* it was agreed between us and *Spain*, "that if any injury should be done not warranted by the orders of his majesty on the one hand, or of the states-general on the other, the peace should not be thereby considered as *ipso facto* broken, but that it should be lawful, in case of an open denial of justice, to seek redress according to custom, by issuing letters of marque and reprisal." Such is the *common law*, which has long been and still is used among nations, when justice is denied by the sovereign, and it is conformable to the opinion of all who have written on this subject. There is never any occasion for reprisals, except in time of peace, though *Mornac*† is of opinion, that they cannot be granted, except where there is actual war. But he is certainly mistaken.

Reprisals, therefore, are a means of redress, to be used only in case of a denial of justice. They are an authorization, granted by a sovereign, to take the persons and goods of the subjects of another prince; in order to obtain satisfaction for an injury‡ committed upon his own subjects,§ for which

perty shall have been seized by virtue of the letters of reprisal, and moreover, to restore four times the amount which he shall have received. For the sake of greater regularity, letters of reprisal are, in all cases, to express the sum for which they are given, and to specify a time to which their exercise is limited, and after the expiration of which, they become void. *Ord. de la Mar.* l. 3. tit. 10. *Des Représailles.* T.

* Art. 31, of the truce, and 60 of the treaty above mentioned.

† Ad auth. *sed omnino*, cod. *ne uxor pro marito*.

‡ *Valin* is of opinion, that letters of reprisal may be granted not only for reparation of an injury done by means of actual force and violence, but also for a debt justly due by a subject of a foreign power, for which the creditor has not been able to obtain justice in a regular course of legal proceedings. *Traité des Prises*, p. 321. T.

§ Mr. *Valin* is also of opinion, that not only a subject, by birth or naturalization, may apply for and obtain letters of reprisal, but also a

justice has been denied by the sovereign of the offending party. Thus, an injury committed by force and violence, and not repressed by the competent magistrate, is redressed by the same means and in the same manner.

In order that no one should rashly complain of a denial of justice, special provisions have been made by treaties between different nations. By the 24th article of the treaty of peace between *England* and the states-general of the 5th of *April* 1654, reprisals are not to take place, except *sub modo*; for, it is there stipulated, "that letters of reprisal shall not be granted, unless the prince, whose subject shall conceive himself to have been injured, shall first lay his complaint before the sovereign whose subject is supposed to have committed the tortious act, and unless that sovereign shall not cause justice to be rendered to him within three months after his application. This stipulation was renewed by the 31st article of the treaty of peace between the same nations, of the 31st of *July* 1667.

There are many other instances of treaties between nations, in which this subject has been attended to. In the treaty of commerce between the king of *France* and the states-general, of the 27th of *April* 1669, article 17, after stipulating, that reprisals shall not be resorted to, unless justice shall have been first denied, it is immediately added, "that justice shall not be considered as having been denied, unless the petition by which letters of reprisal are applied for shall have been first communicated to the ambassador of the sovereign whose subjects are complained of, that he may inquire into the truth of the complaint, and if he finds it true, that he may cause justice to be done to the injured party within four months.* Thus, without

foreigner, domiciliated in the country (*regnicola*;) the state being bound also to protect him, and to consider the injury done to him as an affront to the majesty of the sovereign. *Ibid.* p. 225. T.

* By the treaty of *Ryswick*, art. 9, and the treaty of *Utrecht*, art. 16, (the latter concluded between *England* and *France* on the 11th of *April* 1713), it is stipulated, "that letters of reprisal shall not thereafter be granted by either of the high contracting parties, to the prejudice or detriment of the subjects of the other, except only in such case wherein justice is denied or delayed; which denial or delay of justice shall not be regarded as verified, unless the petitions of the person who desires the said letters of reprisal

any violation of the existing peace, the sovereign against whose subjects a complaint is made, sits in judgment upon it, and pronounces his own sentence. It is certainly useful to restrict the use of reprisals by similar treaties; for, it would be unjust to take it away altogether between the subjects of independent nations.

It was, however, stipulated, by the 9th article of the treaty between the emperor of *Morocco* and the states-general, of the 24th of *September* 1610, "that neither of the two sovereigns should issue letters of reprisal, but that they should administer justice to each other's subjects." But this is an idle stipulation; for what is to be done, if justice is not administered? The injured sovereign will then have recourse to reprisals, and will say that he is compelled to it by the exigency of the case. If it be agreed between princes, that justice shall be mutually administered to the subjects of each other, that stipulation should be performed with good faith; but still, it is true, that the obligation to render justice to foreigners, exists independent of treaties, and whether there is or not, a special convention to that effect, reprisals are not to be resorted to, unless justice is previously denied.

It might, perhaps, be supposed, that reprisals are entirely taken away by the 16th article of the abovementioned treaty of the 5th of *April* 1654,* because it is there agreed, that if

be communicated to the minister residing there, on the part of the prince against whose subjects they are requested to be granted; that within the space of four months or sooner, if it be possible, he may manifest the contrary, or procure the satisfaction which may be justly due. And if there should not be on the spot, any minister or ambassador from that sovereign, no letters of reprisal shall be issued until after the expiration of the four months, reckoning from the day on which the petition shall have been presented to the prince against whose subjects the letters are applied for, or to his privy council."

The same stipulation is contained in substance, in the 3d article of the treaty of commerce concluded between *Great-Britain* and *France*, on the same day with the treaty of *Utrecht*, and in all the treaties made at *Utrecht* at the same time between the other powers; "and thus," says *M. Valin*, "it has become a part of the common law of nations." *Traité des Prises*, p. 331.—It is also contained (except the last clause) in the treaty of commerce between *France* and *Great-Britain*, of the 26th of *September* 1786, art. 3. *T.*

* Above, p. 185.

any one shall commit an infraction of the peace subsisting between the two powers, the infractor shall be punished, and judgment shall be given within a certain time, which is limited by the same article. But such an inference would not be correct, for, what if the criminal should not be punished, or if what he had forcibly taken away should not be restored? Reprisals, in such a case, would still have to be resorted to; and that such was the intention of the parties, appears by the 24th article of the same treaty, in which, as I have already shewn, there is a mode of proceeding pointed out for the granting of letters of reprisal. Since reprisals are in use among nations, these, and war, which follows close at their heels,* are the only remedies of independent sovereigns, for repelling unjust aggressions, as they cannot submit themselves to the judgment of a foreign prince, which they would consider as a shameful prostitution of their own majesty.

It seems that the power of granting letters of reprisal belongs to the sovereign alone; for, it is beyond the authority of subordinate magistrates. It is so observed every where, even in *France*, where formerly letters of reprisal were granted by the parliaments.† When the towns of the *Netherlands* waged separate wars, they, in like manner, granted letters of reprisal. There exists an ancient law of the city of *Amsterdam*, by which it was provided, that if any injury should be done to one of its citizens out of its territory and jurisdiction, either by main force and violence, or by an *unjust judgment*, (which last expression, I beg the reader will particularly observe), the

* *Les représailles—sans annoncer précédemment la guerre, y conduisent naturellement, & en ont assez souvent le prétexte.* Reprisals do not, it is true, precisely indicate war, but they naturally lead to that state of things, and are often enough a prelude to it. *Valin, Traité des Prises*, p. 324. T.

† *Celui droit est de puissance absolue, qui ne se communique ni délègue aux gouverneurs des provinces, villes & cités, amiraux, vice-amiraux ou autres magistrats.* The right of granting letters of reprisal, is a right *communis imperii*, and cannot be communicated nor delegated to the governors of provinces, cities or towns, nor to the admirals, vice-admirals or other magistrates. *Le Guidon*, c. 10, art. 10. The parliaments of *France*, however, exercised it until the year 1485, when *Charles VIII.* by a special ordinance, reserved it exclusively to himself. *Valin, ibid.* p. 329. T.

CHAPTER XXV.

Miscellaneous Maxims and Observations.

I. *It is not lawful to take or retain possession of a neutral fortress, for fear the enemy should occupy it.*

In the year 1620, the states-general, who had promised to evacuate the fortress of *Lieroot*, in *East Friesland*, did not do it, but kept possession of it, "lest," said they, "the enemy should occupy it, and make use of it against themselves." They were clearly in the wrong, and acted in this against the opinion of prince *Maurice of Orange*, who was no friend to the *Frieslanders*, and was warmly attached to the cause of the states. Their conduct was even blamed by their own counsellors, in 1621, and several times afterwards, as *Aitzema* relates.*

There are men, however, who call themselves lawyers, and who approve of similar injuries, among whom I wish I had not to name the celebrated *Grotius*.† I can tolerate such an opinion in such men as *Zouch*‡ and *Buddaeus*;§ the former

* Aitz. l. 2.

† *Hinc colligere est, quomodo ei, qui bellum pium gerit, liceat locum occupare, qui situs sit in solo pacato: nimirum si non imaginarium, sed certum sit periculum, ne hostis cum locum invadat, & inde irreparabilia damna det.* Hence, it may be inferred, how it is lawful for one who is engaged in a lawful war, to occupy a place situated on neutral territory; particularly if there is a certain and not an imaginary danger of the enemy's occupying it, and from thence doing considerable injury to his adversary. *Grot. De J. B. ac P. l. 2. c. 2. § 10.* *Gronovius*, in a note upon this passage in *Grotius*, considers our author's opinion upon this subject as unreasonable. *Dissentit, absque ratione, amplissimus Bynkershoek.* Whether his dissent was entirely *absque ratione*, the awful events which have taken place in *Europe* within these few years, have surely enabled the reader to decide. T.

‡ *De Jure Fec. p. 2. § 5.*

§ *Philosoph. Pract. c. 5. § 6. ¶ ult.*

of whom, however, borrows it from *Grotius*. They support it by adducing instances of similar rapine, as if example, in such cases, were sufficient; while it is only solving a problem by another problem, *litem quod lite resolvit*. Nor is what they say about *embargoes* of ships at all analogous to the present case; for, ships that are found in the dominions of another sovereign, are in a manner subject to him, and those *embargoes* are laid by virtue of a custom universally received among sovereigns. But, it never has been admitted as a custom, that the dominions, towns or forts of a friendly nation, may otherwise than tortiously be invaded or retained.

II. *Conquered countries, like lands purchased, pass CUM ONERE.*

The king of *Spain* had hypothecated a certain territory for a sum of money which he had borrowed of one who was in friendship with him and the states-general. The states conquered that territory in the course of a war. The counselors of *Holland* were of opinion, that the pledge was extinct.* But they were mistaken, for the states had only conquered what belonged to the king of *Spain*, that is to say, the right of empire and dominion, as he had possessed it. And as he held it subject to that hypothecation, it could not pass over to the states in any other manner. If the states, instead of conquering, had purchased from the king a part of that territory, the creditor would still have been entitled to his whole pledge. He would have preserved his rights against the king of *Spain*, the vendor, who had bound himself for the debt, and against the states-general, who had purchased the land hypothecated for its payment, because property, when sold, passes with all its charges, which remain entire for the benefit of the creditor. But now the *Dutch* have taken the territory, and consider it as confiscated to them. And so it is, as far as it belonged to the king of *Spain*, but that does not include the interest which the neutral creditor had in it. If the hypothecated debt, indeed, had belonged to an enemy, it might also have been justly confiscated by the law of war.

* Consil. Belg. vol. 3. Consil. 2.

III. *Property captured and afterwards ransomed or given up by the enemy, is not thereby liberated from the claims of the insurer or lender at maritime risk.**

It has been questioned, whether property, particularly ships and merchandize, which after being captured, are ransomed or given up by the enemy, to their former owner, are thereby exonerated from the prior claims of the insurers or of those who had lent money thereon *at maritime risk*? Some lawyers have been of opinion,† that if a ship has been ransomed, or if the captor has given her up to her former owner, she has, as it were, ceased to be entire, and she is to be considered as a new ship, and that a *total loss* has taken place with respect to the insurers and lenders at *maritime risk*.

But this appears to me, neither just nor equitable, because the insurer is only responsible for the damage suffered, and the money lender only liable to a loss on the amount of his loan in proportion to that damage. The one, therefore, is not bound to pay, nor the other to lose more, than the amount of the salvage or ransom. Philip the II. in his ordinance upon insurance, of the 20th of *January* 1550,‡ section 27, prohibits the ransoming of vessels from pirates, and therefore permits it from real enemies, with a view, no doubt, to shew, that the insurers are bound for the amount of the salvage, but no farther; otherwise, there was no reason for speaking of *ransom* in an edict which exclusively relates to the subject of *insurance*. Nay, the last clause of the policies in common use among the merchants sufficiently shews, that when a ship is ransomed, the interest which the insurers have therein, is not less redeemed than the property of the owner himself. I am, therefore, of opinion, that the loss or damage which the insurers are bound to pay, and which the lenders at *maritime risk* are obliged to lose, is the precise amount of the money

* The civil law denominates *maritime loans* or *loans at maritime risk*, (*janus nauticum*), those contracts which at common law are called *bottomry* and *respondentia*. T.

† Consil. Belg. vol. 1. Consil. 52.—vol. 3. Consil. 248.

‡ See note † p. 131. in which this ordinance is mentioned, by mistake, as of the 26th, instead of the 20th of *January*. T.

expended in the salvage or redemption of the property. I grant, however, that if a ship has been captured, carried into port, and there condemned and sold, and afterwards is purchased by her first owners, in that case the loss will be total to the underwriters and money lenders; and the ship thus purchased, will be considered as a new ship in the hands of the first owner. There is an opinion to this effect in the *Consilia Belgica*.*

IV. *Orders, in war, are to be strictly obeyed.*

The states-general had ordered, that their troops, who held the citadel of *Reyd*, in the country of *Juliers*, should obey the orders of *Florence van den Boetseler*, who was lord of the place. *Boetseler* exhibited that order to the commandant of the fort, and required him to deliver it up to the *Spaniards*, who were approaching, and the commandant accordingly surrendered it up on the 30th of *August* 1621.† But *Maurice*, prince of *Orange*, was so angry with him on that account, that he punished him with death on the 14th of *September* following, pretending that the order was only applicable to *civil* and not to *military* matters. I doubt whether he did right; for, as the citadel did not belong to the states-general, that order can have meant nothing, but that the rights of the lord of the territory, although he had admitted a garrison within it, were to be kept inviolate, and that the soldiers should not defend the citadel any longer than the lord should think proper, lest he should be involved in the same difficulty with the *Spaniards*, in which the count of *East Friesland* found himself, when the states refused to evacuate fort *Lieroort*, as I have mentioned at the beginning of this chapter.

V. *It is not lawful to repair fortifications during a truce, or pending a capitulation.*

Albericus Gentilis‡ is of opinion, that while a treaty is on foot concerning the surrender of a town or place, it is lawful to finish or repair the fortifications thereof. *Zouch*,§ after him, adopts the same opinion. But *Ferdinand* thought otherwise,

* Vol. 1. Consil. 11. —† Aitz. l. 1.

‡ De Jure Belli, l. 2. c. 18.

§ De Jure Fec. p. 2. § 10. Q. 10.

who, after the surrender of *Reggio*, precipitated the *French* on that very account from the top of the walls;* and when the *Spaniards*, who, in 1622, were besieging *Bergen*, during a truce which had been granted to them to bury their dead, completed their works, and from thence reconnoitred the fortifications of the town, the *Dutch* complained that the truce had been broken, and that the usage of war had been violated.† It was, however, in 1664, agreed at *Bylerschans*, that the truce should not prevent the erecting and perfecting of fortifications on both sides.‡ But it is best, when a truce is made, to suspend every warlike operation, for, such appears to be the intent and meaning of a *truce*; otherwise, it would be very difficult to define it.

VI. *Governments are not bound to repair every loss that is occasioned by the calamities of war.*

When the bishop of *Munster*, in 1665 and 1666, had taken and laid waste certain places in *Over-Tassel*, and the *French*, who had come to the assistance of our countrymen, had not behaved with much more moderation, the people of *Over-Tassel* applied to the states-general to be indemnified for the damage which they had suffered, but the counsellors having been consulted on that subject, gave it as their opinion, that no indemnity ought to be given, except for the deficiency suffered in their taxes and contributions, in proportion to the time during which the places had been occupied by the enemy.§ As to the remainder, it was to be imputed to fate, and was one of those calamities of war which must be supported by those on whom they happen to fall.

Afterwards, however, the same counsellors, having somewhat changed their opinion, thought that an indemnity ought to be allowed to the inhabitants of *Over-Tassel* for other things, and particularly for the money which they had been obliged to raise, to save their towns from threatened conflagration.¶ Agreeably to this latter opinion, the states of *Holland* gave their vote on the 27th of *February* 1667.¶ I think that they

* *Gentil. ubi suprà.* —† *Aitz. l. 1.* —‡ *Aitz. l. 44.* —§ *Aitz. l. 46.*

¶ *Aitz. l. 46.* —¶ *Ibid. l. 47.*

were wrong, as far as concerned the monies levied on the inhabitants, to redeem the towns from conflagration; for, although it is certain, that that money actually saved them from being destroyed by fire; still it was not just, that the other confederates should bear the loss, who had not been exposed to the risk of perishing in that manner. For, nobody will venture to say, that a whole fleet ought to contribute, if a single ship is obliged to have recourse to *jettison*, for her own safety.

VII. *Relates solely to the right of the several provinces of the Dutch confederation to make peace, as incident to that of making war. It is entirely local, and therefore is omitted in this translation.*

VIII. *One who resides in an enemy's country, under a safe conduct from the sovereign, may sue and be sued.*

It has been questioned, whether, if a safe conduct is granted to an enemy to come into our country, he may be sued here by his creditors. It was so decreed by the court of *Holland*, in 1588, and their judgment was confirmed by the supreme court, on the 18th of *September* 1590. Those decrees, I think, were perfectly just; because, the safe conduct given to an enemy, is only to protect him against hostile acts; he becomes, by virtue of it, as it were, a neutral, and neutrals may be sued and detained for their debts. At the same time, if we permit enemies to be sued, we must not prevent them from prosecuting their demands against us in a course of law,* as I have discussed more at large in a former chapter.†

IX. *A safe conduct to go into or pass through the enemy's country, is no protection out of the enemy's territory.*

A safe conduct, in time of war, is given for no other purpose than that the party may safely come into the enemy's territory, and continue there. Wherefore, I am astonished, that lawyers should have doubted, whether he, who has a safe

* In *England*, in a plea of *alien enemy*, the defendant must not only state "that the plaintiff was born in a foreign country, in enmity with *Great-Britain*," but "that he is not residing in the *British dominions* under letters of safe conduct from the king." *Casseres v. Bell*, 8 Term Rep. 166. T.

† Above, c. 7. p. 55, 56.

conduct to pass through the enemy's territory, may be taken in his own country by the law of war. This question was agitated in the case of the marquis of *Messarano*, who had received a safe conduct from the *Spaniards* to go from his own castle to *Venice*, passing through the *Spanish Milanese* territories; but before he set out on his journey, the castle was taken by the *Spaniards*, and himself made prisoner. It was asked, whether he was exempted by his safe conduct from paying any ransom? *Belhus*, who himself sat as judge in the cause, did not venture to decide any thing, as he relates himself in his treatise *De Re Militari*;* neither does *Zauch*, agreeably to his custom, give any opinion on the point.† But *Menochius*‡ distinguishes, whether the marquis was then ready for his journey, or whether he was not; in the first case, he thinks that the safe conduct would; in the second, that it would not have availed him. The doubts of *Belhus* and *Zauch* appear to me as silly as the decision of *Menochius*. The marquis's castle and territory being invaded by the *Spaniards*, he was himself most lawfully a prisoner; because he had only asked for a protection in the enemy's territory, and not in his own, nor had he stipulated for a peace or a truce, but merely for a passage through the *Milanese* country into the territory of *Venice*. Whatever, therefore, was not within that particular object, was to be decided by the law of war.

X. *It is unjust to compel a sovereign to make war or peace.*

As it is unjust to force a prince to make war against his will, it is so likewise, to compel him to make peace. But, when the states-general, on the one hand, were afraid of the *French*, and the great men of *England*, on the other, were displeased with the extent of the territory of *France*, the kings of *England* and *Sweden* and the states-general, made a treaty on the 23d of *January* 1668, in which, among other things, they stipulated, that the *Spaniards*, who were then at war with the *French*, should be compelled to accept of certain conditions,

* P. 9. No. 15, & seq.

† De Jure Fec. p. 2. § 9. Q. 19.

‡ De arbitr. judic. quæst. l. 2. cent. 4. cas. 336. n. 19, & seq.

prescribed by the said treaty; and that after they had accepted them, if the king of *France* should, nevertheless, continue to make war upon *Spain*, the allies should interfere in an hostile manner; and thus, the *French* and *Spaniards* were COMPELLED to make peace.

In another instance, when it was not thought proper for the welfare of *Europe*, that the king of *Sweden* should also possess *Denmark*, the *French*, the *English* and the *states-general*, on the 21st of *May* 1659, forced the king of *Sweden* to make peace with the *Danes*,* and thus saved the king of *Denmark* from total ruin, to which he was exposed in consequence of having excited a neighbour more powerful than himself.

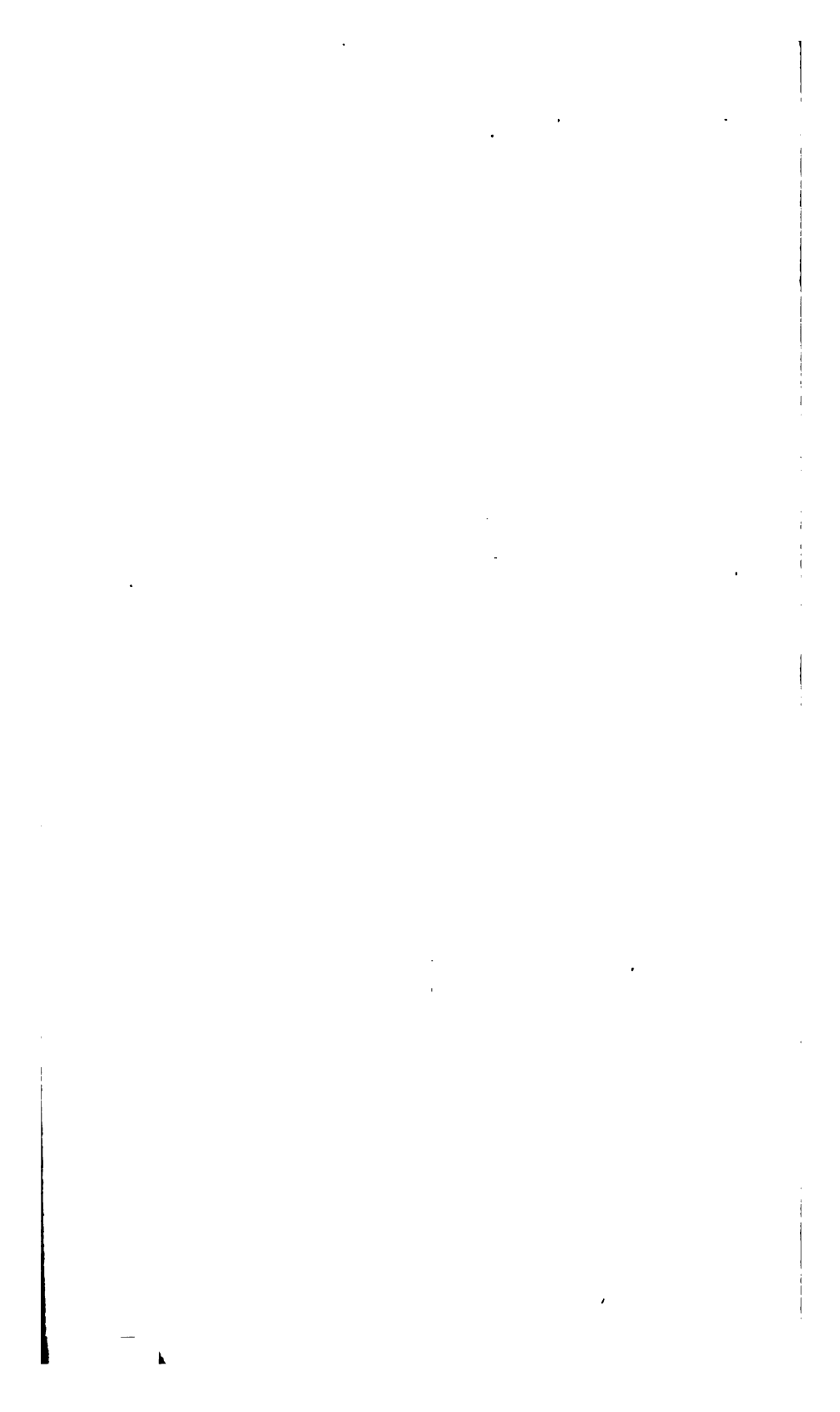
These are real injuries, cloaked with the pretence of a wish to make peace; a pretence which has been used to cover injuries of a much greater magnitude, which have been fashionable for some years past; for, princes, in their treaties with each other, have been in the habit of disposing of the dominions and territories of other sovereigns as if they were their own. Such injuries are the offspring of what is called the *reason of state*:

Monstrum horrendum, informe, ingens, cui lumen ademptum.

If governments will yield to that monster, and indulge themselves in following its dictates, and considering the property of other nations as their own, it is idle and useless to investigate any more the law of nations, or discuss its principles.

* Aitz. l. 48.

THE END.



ERRATA.

Page 4, note ‡, line 2, for "first consul," read *emperor*.

Page 21, *dele* note ‡. It was a mere newspaper account, which was not confirmed, and ought not to have had a place in this work.

Page 31, *dele* note *, and in lieu thereof, insert a reference to p. 87.

* Page 46, line 10, for "*Paul*," read *Paulus*.

Page 71, in the note, 3d line from the bottom, after "*lord Hawkesbury*," read *now earl of Liverpool*.

Page 82, note ‡, line 7, for "any," read *my*.

Page 91, note ‡. This note is not sufficiently clear, having been written in too much haste. It was enough to have observed, that our author does not seem to have sufficiently attended to the distinction established by the edict to which he refers between neutral vessels, which, after leaving a blockaded port, *go voluntarily* into their own or some other free port, or go into such port on being *chased* and to avoid *pursuit*; in the second case, they are lawfully captured, if met with coming out of such port; and it makes no difference, whether it is the port of their actual destination, another port of their own country, or some other *free* or friendly port. Our author seems to think, that it does make a difference, and this mistake leads him into an unnecessary discussion about words.

Page 118, note *, line 4, for "for, of other rights he may judge as if no war existed," read "for, of other rights, *unconnected with the war, or its objects*, he may judge as if no war existed."

Page 120, the note of reference * ought to be placed after the words "commercial intercourse," in the fourth line from the bottom of the text.

Page 131, note ‡, first line, for "26th of *January*," read 20th of *January*.

Page 148, in the note, line 7, for "3000 rials de vellon, equal to \$1500," read 60,000 rials de vellon, equal to \$3000—and add, that *the amount of that security may be moderated at the discretion of the officers of the admiralty, according to the size of the privateers, and the number of men and guns which they respectively carry*.

Page 183, note §, first line, for "may," read *might*.

Page 186, line 12, in note, for "treaty of *Utrecht*," read "treaty of *peace of Utrecht*."

Subjoin the mark T to the following notes:

* and ‡ p. 105—† p. 106—§ p. 114—‡ p. 115—‡ p. 125—and in a few copies of this work, to notes, § p. 184—† p. 187, and * p. 188.



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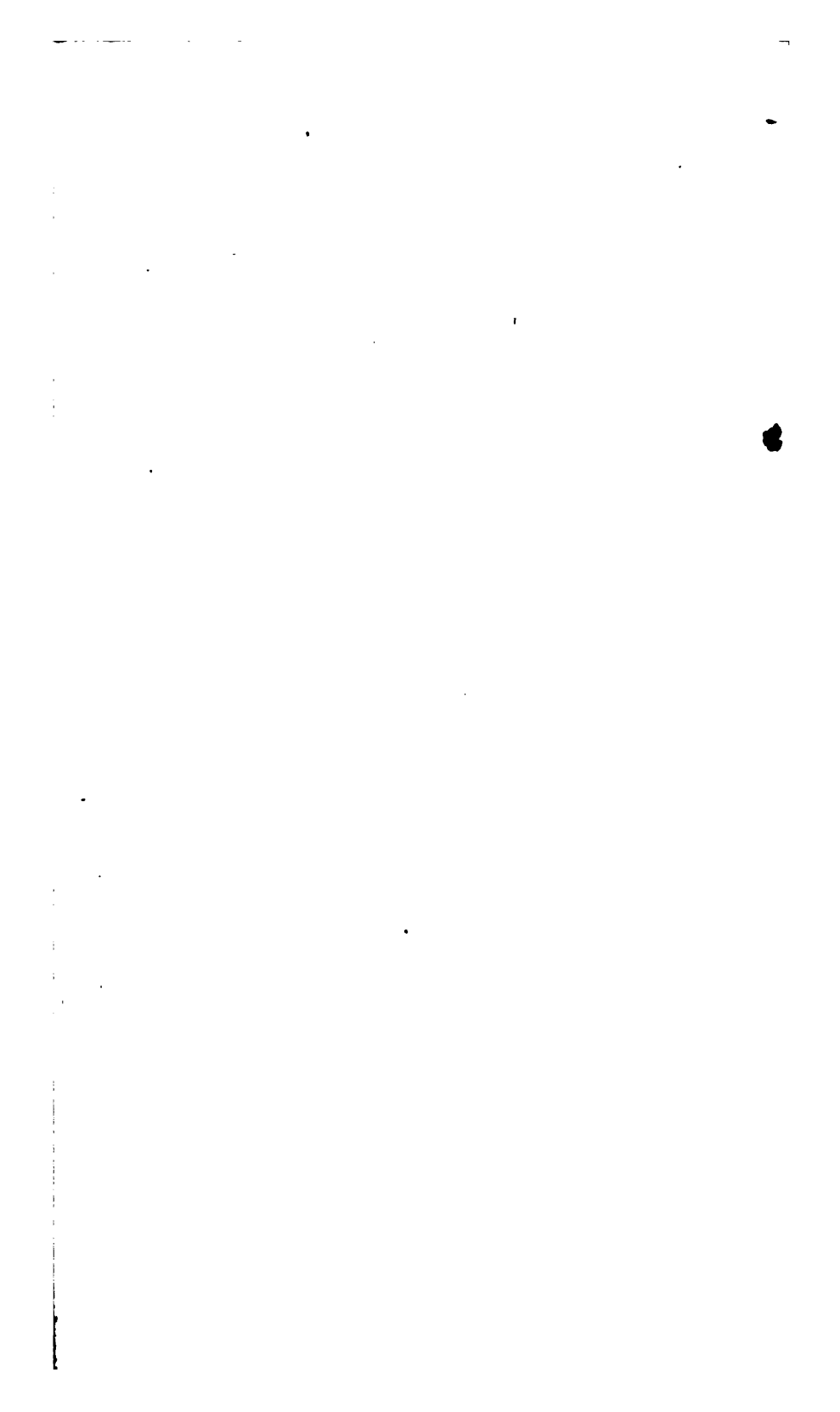
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